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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

98

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

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BOOK VII.

ACQUISITION OF PROPERTY ON DEATH OF FORMER OWNER.

CHAPTER I.

ESCHEAT.

LIT. § 348. Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

Co. LIT. 13 a. *Escheat, eschaeta*, is a word of art, and derived from the French word *escheat* (*id est*) *cadere, excidere* or *accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiae* or *terrae excadentiales*. “*Dominus vero capitalis loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco hæredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.*” And Ockam (who wrote in the reign of Henry the Second) treating of tenures of the king, saith, “*porro eschaetæ vulgo dicuntur, quæ decedentibus hiis qui de rege tenent, &c., cum non existit ratione sanguinis hæres, ad fiscum relabuntur.*” So as an escheat doth happen two manner of ways, “*aut per defectum sanguinis,*” *i. e.* for default of heir, “*aut per delictum tenentis,*” *i. e.* for felony, and that is by judgment three manner of ways, “*aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.*” And therefore they

which are hanged by martial law "in furore belli" forfeit no lands; and so in like cases escheats by the civilians are called "caduca."

The father is seised of lands in fee holden of I. S., the son is attainted of high treason, the father dieth, the land shall escheat to I. S., *propter defectum sanguinis*, for that the father died without heir. And the king cannot have the land, because the son never had anything to forfeit. But the king shall have the escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

Co. Lrr. 13 b. And it is to be well observed that our author saith, *if he hath no heir, &c., the land shall escheat*. In which words is implied a diversity (as to the escheat) between fee simple absolute, which a natural body hath, and fee simple absolute, which a body politic or incorporate hath. For if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have again this land, and not the lord by escheat.¹ And so if land be given in fee simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politic or incorporate is dissolved, the donor shall have again the land, and not the lord by escheat. And the reason and the cause of this diversity is, for that in the case of a body politic or incorporate the fee simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politic or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath been said) no writ of escheat lieth but in the three cases aforesaid, and not where a body politic or incorporate is dissolved.

3 Inst. 21. If a man seised in fee of a fair, market, common, rent-charge, rent-seck, warren, corody, or any other inheritance, that is not holden, and is attainted of felony, the king shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, nor can they escheat because they be not holden, they perish and are extinct by act in law: for in escheats for petit treason or felony, a tenure is requisite, as well in the case of the king, as of the subject.

¹ *Vid. tamen Mich. 20 Jac. C. B. Johnson and Morris, that it shall escheat*. Hal. MSS. which also cites 21 E. 4, 1, and 21 H. 7, 9. See further on this subject, Godb. 211, and Mo. 283, which are with Lord Coke. But the case of *Johnson and Norway*, in Win. 37, which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch that the judges finally decided the point. See also *contra* Lord Coke, the case of *Southwell and Wade*, in 1 Ro. Abr. 816 A, pl. 1, and *a. c.* in Poph. 91. — Hargrave's note *ad loc.* See Gray, *Rule against Perpetuities* (2d ed.), §§ 44-51 *u.*

JOHNSON v. NORWAY.

COMMON PLEAS. 1622.

[Reported *Winch*, 37.]

JOHNSON brought an action of trespass against Norway of trespass made in a piece of ground, and the defendant pleaded that 14 H. 7, Roger Le Strange and Anne his wife were seised of the manor of D., and one Giles Sherington, abbot of C., was seised of an acre of land in fee, and held this of the said Roger Le Strange as of the manor of D. aforesaid, and that the 22 H. 7, the abbot and all the monks died, by which the said land escheated to Roger, &c., and the manor descended to his son and heir after his death; who conveyed the manor of which the acre is parcel after the escheat by mean conveyance to Hobert in fee, and that Hobert 12 Eliz. enfeoffed one Wright of the manor, of which the said acre is parcel, and so justified by a conveyance from Wright to the defendant: the plaintiff replied by protestation that the abbot was not eligible, and for plea he said, that the aforesaid Hobert 10 Eliz. enfeoffed I. S. of the said acre of land, *absque hoc*, that he enfeoffed Wright of the said manor of which the said acre is parcel; and upon this the defendant demurred generally. And *Serjeant Attoe* argued for the plaintiff, that the plea of the defendant is evil, and then though the replication of the plaintiff is not good, yet the plaintiff shall have judgment, and he cited *Turner's Case*. HOBERT, It is true, if the replication be merely void, then it is as you had said, but if the replication be the title of the plaintiff, and that be insufficient, there the plaintiff shall not have judgment, though the plea in bar was evil. *Attoe* agreed, that if it appear by the plaintiff's own showing that he had no cause of action, and that he had no title, he shall not have judgment, but here he had made a good title by the lease of the said acre of land, and though our traverse is evil, and sounds in doubleness, yet the defendant had demurred generally, and so he had lost the advantage of the doubleness, or of the negative pregnant, for if a man plead double matter, this is only matter of form, and not of substance, and therefore after verdict it is good as hath been adjudged: but he proceeded in his argument, and he said that the bar of the defendant is not good, for by his own showing this acre of land is not parcel of the manor, for by the dissolution of the monastery by the death of all the monks, the land shall go to the founders and donors, and not to escheat to the lord of which that is holden, as appears 2 H. 6, 7, and 5 H. 7, if an annuity or rent be granted to an abbot in fee, and the abbot and all his monks do die, the annuity or the rent is extinct, and shall not escheat: see the *Dean of Norwich's Case*, Co. 3, agreed, that by the death of the abbot and his convent the corporation is dissolved, and then the possession shall go to the founders, and shall not escheat to

the lord of the manor of which the land was holden, and he said that this point is proved clearly by the Statute, of the 27 H. 8, and 31 H. 8, of Monasteries, in which Statutes there is an express saving to all persons, except to the donors and to their heirs; and no mention is made of the saving of the right of those of whom the land was holden; and that proves clearly. that if the makers of the Statute had thought that the land had escheated to the lords, they would have excepted them in the saving of the Act, as they had excepted the donors and founders, for if otherwise the lands and possessions shall escheat to the lords of which the land was holden, they are within the saving of the Statute; and then it will follow that after the death of all the monks, as at this day, that the lords shall have the land by escheat, which the sages of the law never dreamt of who made that Statute, that anything may accrue to the lord, and therefore they provided only for the title of the donors and founders, which is an argument that they thought that upon the dissolution of the monasteries that the lands shall go to the founders, and the same be thought concerning a corporation at this day, as of Sutton's Hospital, &c., and so be concluded that, because in the bar of the defendant he claimed to hold from the lord, to whom he supposed the land to escheat, and did not claim, &c., by his own showing the bar is not good: and though our replication and traverse is not good, yet the plaintiff shall have judgment.

But admitting that the bar is good, yet the replication and traverse is good, and then judgment shall be given to the plaintiff: and the case is, the defendant pleaded a feoffment of the manor 12 Eliz. to Wright after that he had showed the escheat of an acre, the plaintiff replied that the 10th Eliz. the feoffor enfeoffed C. of the acre of land, *absque hoc* that he was enfeoffed of the manor of which the acre is parcel, and *Attos* argued that the traverse is good, and he alleged 38 H. 6, 49, the same traverse, and here when the defendant had pleaded that the acre escheated, and had alleged a feoffment of the manor, and had not expressly alleged a feoffment of the acre, the plaintiff may traverse that which is not expressly alleged, because this destroys the very title of the defendant; and he cited for that 34 H. 6, 15, a writ of privilege in trespass, as a servant to an auditor of the exchequer, the plaintiff replied that he was servant to him in husbandry, *absque hoc* that he was his servant to wait and attend upon him in his office, and it was holden a good traverse, and yet that was not expressly alleged by the defendant.

HOBERT, Chief Justice, said, that the traverse is not good, for by the feoffment which was made the 12th Eliz. he had confessed and avoided the feoffment which was made 10th Eliz., and so there needed no traverse, and therefore, he said, the great doubt of the case will be upon the bar of the defendant, whether by the death of the abbot and the monks the land escheat to the lords of whom that was holden, or whether that shall go to the donors and to the founders, and he thought that the land shall escheat, to which WINCH seemed to agree; and

HOBERT said, that the writ of *contra formam donationis* was given to the founder or donor by the Statute, and not by the common law; but in the principal case, the judges said they would advise of that, and gave day over to argue that again.¹

¹ See preceding note.

NOTE — "Escheat therefore being a title frequently vested in the lord by inheritance, as being the first of a seignior to which he was entitled by descent (for which reason the lands escheated shall attend the seignior, and be inheritable by such only of his heirs as are capable of inheriting the other), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his own act or agreement), than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed, this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title: and therefore this distribution of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: for, as escheats must follow the nature of the seignior to which they belong, they may vest by either purchase or descent, according as the seignior is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, and therefore taking by descent in a kind of caducary succession." — 2 Bl. Com. 244. See Co. Lit. 18 b, Hargrave's note.

"Great care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord; which by reason of their similitude in some circumstances, and because the Crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any seignior or lordship paramount: but, being a prerogative vested in the Crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

"The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat, as it would have done to

the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason." — *Id.* 251.

On attainder and civil death, see *Kynnaird v. Leslie*, L. R. 1 C. P. 389 (1866). Cf. *Avery v. Everett*, 110 N. Y. 317 (1888); *Estate of Donnelly*, 125 Cal. 417 (1899).

On the rights of the Crown to equitable interests in real and personal property when *cestui que trust* dies without heirs or next of kin, see cases collected in Ames, *Cases on Trusts* (2d ed.), pp. 351 *et seq.*; and cf. Mr. Hardman's article in 4 *Law Quart. Rev.* 318.

See 33 & 34 Vict. c. 28, § 1 (1870); Stimson, *Am. Stat. Law*, § 143.

CHAPTER II.

DESCENT.

SECTION I.

IN GENERAL.

ST. 20 HEN. III. (MERTON) c. 9. — To the King's Writ of Bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered, that they would not, nor could not, answer to it; because it was directly against the common order of the Church. (2) And all the bishops instanted the Lords, that they would consent, that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, forso-much as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the laws of the realm, which hitherto have been used and approved.

LIT. § 2. And if a man purchase land in fee simple and die without issue, he which is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

LIT. § 3. But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to his son, for that he cometh to the land by collateral descent and not by lineal ascent.

LIT. § 4. And in case where the son purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side: but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother. But if a man marrieth an inheritrix of lands in fee simple, who have issue a son, and die and the son enter into the tenements, as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs of the part of the father. And if he hath no heir on

the part of the mother, then the lord, of whom the land is holden, shall have the land by escheat. In the same manner it is, if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heir on the part of the mother. And if there be no heir of the part of the father, the lord of whom the land is holden shall have the land by escheat. And so see the diversity, where the son purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

LIT. § 5. Also, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

LIT. § 6. Also, it is to be understood, that none shall have land of fee simple by descent as heir to any man, unless he be his heir of the whole blood. For if a man hath issue two sons by divers venters, and the elder purchase lands in fee simple, and die without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cousin, shall have the same, because the younger brother is but of half blood to the elder.

LIT. § 7. And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue, the sister shall have the land by descent, as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

LIT. § 8. And also, where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son in the case aforesaid enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be two brothers by divers venters, and the elder is seised of land in fee, and die without issue [and his uncle enter as next heir to him, who also dies without issue], now the younger brother may have the land as heir to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

Co. LIT. 13 a. If a man giveth lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs of the part of the father shall inherit. for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his

mother) are void, as in the case that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heirs males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.¹

Co. Litt. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed, “quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred’ ipsius Johannis de præfata Robergia per præfatum Johannem procreat’ præfat’ Matildæ filiæ prædict’ Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict’.” And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

CANONS OF DESCENT.²

1. INHERITANCES shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.³

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

4. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor: that is, shall stand in the same place as the person himself would have done had he been living.

5. On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.⁴

¹ In *Johnson v. Whiton*, 159 Mass. 424 (1893), land was devised to A. “and her heirs on her father’s side.” The court held, that A. could convey an unqualified fee.

² These canons are taken from Blackstone. On the Law of Descent, see 2 Bl. Com. c. 14, pp. 201-240.

³ See *Jackson d. Austin v. Hare*, 14 Johns. 405 (N. Y., 1817).

⁴ “The method of computing these degrees in the canon law, which our law has adopted, is as follows: We begin at the common ancestor and reckon downwards: and

6. The collateral heir of the person last seised must be his next collateral kinsman of the whole-blood.↘

7. In collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near); unless where the lands have, in fact, descended from a female.↘

BUSHBY v. DIXON.

KING'S BENCH. 1824.

[Reported 3 B. & C. 298.]

DEBT on a bond, dated the 12th of November 1795, executed by John Milbourn Dixon, deceased, and Lucy Dixon, deceased, to John Bushby, deceased, in the penal sum of £360, conditioned for the payment of £180, with interest, at 4½ per cent. on the 12th of November 1796. The first plea was *Non est factum*. The second *Solvit ad diem*. The third *Solvit post diem*. On which pleas respectively issues were joined, and found for the plaintiff. The last plea and issue thereon were as follows: that defendant ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because he, the said defendant, hath not, nor at the time of the exhibiting the bill of the said plaintiffs in this behalf, nor at any time before or since, had he any lands, tenements, or hereditaments by descent from the said John Milbourn Dixon, in fee simple; and this, &c., wherefore he prays judgment if he, the said defendant, as heir of the said John Milbourn Dixon deceased, ought to be charged with the said debt by virtue of the said writing obligatory. Replication, that the defendant hath, and at the time of the exhibiting of the bill of the plaintiffs in this behalf, had sufficient lands, tenements, and hereditaments by descent from the said in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother are related in the first degree; for from the father to each of them is counted only one; Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of Titius." — 2 Bl. Com. 206.

¹ "In agnation too is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half-blood from succeeding to one another's lands. In the customs of Normandy, the rule applies to *uterine* brothers only, that is, to brothers by the same mother but not by the same father; and, limited in this way, it is a strict deduction from the system of agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clew to its principle, interpreted it as a general prohibition against the succession of the half-blood, and extended it to *consanguineous* brothers, that is to sons of the same father by different wives. In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half-blood." — Maine, *Anc. Law* (4th ed.). 151.

² See *Clerc v. Brook*, Plowd. 442, 450, 451 (1573); 2 Bl. Com. 238, 240; *Davies v. Loundes*, 7 Scott, 21, 56 (1838).

John Milbourn Dixon in fee simple, wherewith the said defendant could, and might, and ought to have satisfied the said debt above demanded. At the trial before *Holroyd, J.*, at the Summer Assizes for Cumberland, 1823, a verdict was found for the plaintiffs on this last issue, subject to the opinion of the court on the following case. The obligor, Lucy Dixon, at the time of making her will, and also of her death as hereinafter mentioned, was seised in fee of the adjoining tenements of Catlowdy and Simeons Onset, being both of freehold tenure, and situate in the parish of Kirk Andrews upon Esk, in the county of Cumberland; and by her will duly executed, devised her messuage or tenement, called Catlowdy, to her daughter Ann, the wife of John Milbourn, for her life with power to dispose thereof by will. Lucy Dixon died so seised, on the 15th of June 1797. At the time of making her will, and also of her death, both Catlowdy and Simeons Onset were occupied as one farm, being in the possession of the same person as tenant from year to year of the whole, under one rent; which person continued in possession as tenant until the year 1807. From the time of the death of Lucy Dixon, Ann Milbourn, and John Milbourn her husband, contending that Simeons Onset passed by this devise, received the rents of both estates during her life. Ann Milbourn died in 1801, and after her death, her husband John Milbourn received the rents and profits both of Catlowdy and Simeons Onset, as tenant by the curtesy until his death, which took place in June 1815. In 1807, the said John Milbourn granted a lease of the two tenements to John Forster and Adam Forster for nine years, under which the lessees held the possession, and paid the rent to John Milbourn during his life; the last rent which was paid by them to John Milbourn was at Whitsuntide 1815, and then due, which was subsequently to the death of John Milbourn Dixon, the other obligor, which took place on the 27th of April 1815. The obligor John Milbourn Dixon was the heir at law of Lucy Dixon, and he, in Hilary Vacation 1815, served a declaration in ejectment upon the tenant in possession of Simeons Onset, claiming it as heir at law of Lucy Dixon, but he died as before stated, on the 27th of April 1815, and no further proceedings took place therein. The defendant, after the death of his father, brought another ejectment, and after obtaining a judgment by default, recovered the possession of Simeons Onset in Trinity Vacation 1815. Afterwards one Isaac Milbourn, the son of the said Ann Milbourn, brought an ejectment for the same premises, which was defended by J. M. Dixon the present defendant, upon the trial of which a verdict was found for the defendant, and a rule *nisi* having been obtained to set aside that verdict, the Court of King's Bench upon argument discharged the rule, being of opinion that Simeons Onset did not pass either by the will of Lucy Dixon or of Ann Milbourn. The question for the opinion of the court is, whether the present defendant took Simeons Onset by descent from his father.

Patteson, for the plaintiff.

Tindal, contra.

ABBOTT, C. J. I am of opinion that the verdict on the last issue must be entered for the plaintiffs. It is clear that if the obligor was ever actually seised of the estate in question, for however short a time, the defendant takes it by descent from him. But the seisin of the obligor must be shown to have been a seisin in fact. That is also necessary to make a *possessio fratris*, so as to cause the descent of an estate to a sister of the whole blood, in preference to a brother of the half blood; and therefore whatever seisin suffices in the latter case will suffice to charge the defendant in this action. Adverting to the doctrine on this point in Co. Lit. 15 a, we find it laid down thus: "If the father maketh a lease for years, and the lessee entereth, and dieth, the eldest son dieth during the term, before entry or receipt of rent, the youngest son of the half blood shall not inherit, but the sister; because the possession of the lessee for years (and a tenant from year to year is to be considered a lessee for years for this purpose,) is the possession of the eldest son so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heir." This establishes that the possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and therefore gives him a seisin in fact. On the authority of this doctrine, which has been very often recognized in other cases, I think that we are bound to say that the obligor, J. M. Dixon, was for a time seised in fact of Simeons Onset, and consequently that the defendant had the land by descent from him, and is thereby rendered chargeable in this action.

BAYLEY, J. It is clear on which side the justice of this case lies, for as heir either of Lucy Dixon or of his father, the defendant is certainly liable to discharge this bond. But still we must see that he is properly charged as heir of his father, in order to give judgment for the plaintiffs in this action. It seems to me that the taking of the esplees by the tenant is a taking for the person seised of the freehold. In *Ratcliffe's Case*, 3 Co. 42, there is this passage relating to the doctrine of *possessio fratris*, "If the elder son enters, and by his own act hath gained the actual possession, or if the lands were leased for years, or in the hands of a guardian, and the lessee or guardian possess the land, there the possession of the lessee or guardian doth vest the actual fee and freehold in the elder brother." Where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact. But when there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor. The subsequent misconduct of the tenant in paying rent to another person, or the mistake of the heir as to his rights, cannot by relation alter the nature of the seisin which he before had. In this case, therefore, I am of opinion that the defendant took the land in question by descent from his father, and that the verdict on the last issue must be entered for the plaintiffs.

HOLROYD, J. I think that the defendant is liable to this action as heir of his father, having received lands by descent from him, his father having been seised of them in fact. Lord Coke puts the two

cases of a man dying seised of lands in his own possession, and of lands in the possession of a tenant for years. If he is in possession himself, the freehold descends on the heir, and he is immediately seised in law, but not in fact. In Co. Lit. 277 a, speaking of an abator, he says: "Abate is both an English and French word, and signifieth, in its proper sense, to diminish or take away; as here by his entry he diminisheth and taketh away the freehold *in law* descended to the heir." And again: "A disseisin is a wrongful putting out of him that is *actually* seised of a freehold. An abatement is when a man died seised of an estate of inheritance, and between the death and the entry of the heir an estranger doth interpose himself, and abate." So that if a man die seised of land in his own possession, and the heir does not enter, and a third person does, that which would have been a disseisin if the heir had entered, is an abatement. Again, in Co. Lit. 243 a, it is said, that if the ancestor leases for years, and dies, the possession of the lessee for years maketh an *actual* freehold in the eldest son. Thus, the case of an ancestor dying seised of lands in the possession of a tenant for years, is, in this respect, put on a different footing from his dying seised where there is no tenant; and in the former case the heir has such a seisin as renders the land descendible from him. And if there be an actual seisin in the heir, that will not be defeated *ab initio* by a subsequent neglect on his part to claim rent, or on the part of the tenant to pay it. The lessee was bound to pay rent to the lessor and his heirs, and therefore cannot be permitted to say that he took the esplees for any one else. The defendant in this case then must claim the land by descent from his father, the obligor, and is liable to be charged with the bond debt.

LITLEDALE, J. I also am of opinion that the plaintiffs are entitled to recover on the third issue. If the obligor was ever actually seised, the defendant takes by descent from him. At the moment of Lucy Dixon's death, the obligor did become actually seised, for the possession of the tenant for years is the possession of the owner of the freehold. In the old entries of pleadings in real actions leases for years are never noticed; it is never said that the land descended from A. to B. subject to a term. In those days it was considered that the tenant was in the nature of a bailiff or servant, and therefore that he took the esplees for the benefit of the owner of the freehold. But stress has been laid on the fact of rent being paid to a third person. That, however, makes no difference. Although no rent was paid to the obligor, still at the moment of Lucy Dixon's death the possession of the tenant was the possession of her heir. He then became immediately seised in fact. It is immaterial to this question whether he was afterwards disseised or not, the land descended from him to the defendant, who is therefore liable to discharge the bond of his ancestor.

*Judgment for the plaintiffs.*¹

¹ Cf. *Goodtitle d. Newman v. Newman*, 3 Wils. 516 (1774). See *Thompson v. Sandford*, 13 Ga. 238 (1853).

The English law of descent was changed by the St. of 3 & 4 Wm. IV. c. 106 (1833).

For the American Statutes of Descent, see Stimson, *Am. Stat. Law*, §§ 8100-8155, and 4 Kent, Com. 373-422.

SECTION II.

BREAKING DESCENT.¹A. *By Deed.*

Co. Lrr. 12 b. It is necessary to be known in what cases the heir of the part of the mother shall inherit, and where not. If a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase, and if he dieth without issue, the heirs of the part of the father shall first inherit.² If a man so seised maketh a feoffment in fee upon condition, and die, the heir of the part of the father, which is the heir at the common law, shall enter for the condition broken, but the heir of the part of the mother shall enter upon him, and enjoy the land. A man so seised maketh a feoffment in fee reserving a rent to him and to his heirs, this rent shall go to the heirs of the part of the father; but if he had made a gift in tail, or a lease for life reserving a rent, the heir of the part of the mother shall have the reversion, and the rent also as incident thereunto shall pass with it; but the heir of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can pass therewith. If a man had been seised of a manor as heir on the part of his mother, and before the Statute of *Quia emptores terrarum*, had made a feoffment in fee of parcel to hold of him by rent and service, albeit they be newly created, yet for that they are parcel of the manor, they shall with the rest of the manor descend to the heir of the part of the mother, *quia multa transeunt cum universitate quas per se non transeunt*. If a man hath a rent-seck of the part of his mother, and the tenant of the land granteth a distress to him and to his heirs, and the grantee dieth, the distress shall go with the rent to the heir of the part of the mother, as incident or appurtenant to the rent, for now is the rent-seck become a rent-charge.

¹ See Watkins on Descents, c. 5.

² But here Lord Coke must be understood to speak of two distinct conveyances in fee; the *first* passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the *second* regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by purchase. — Harg. note.

Co. Lit. 13 a. A man so seised as heir on the part of his mother maketh a feoffment in fee to the use of him and his heirs, the use being a thing in trust and confidence shall ensue the nature of the land,¹ and shall descend to the heir on the part of the mother. A man hath a seigniorship as heir of the part of his mother, and the tenancy doth escheat, it shall go to the heir of the part of the mother. If the heir of the part of the mother of land whereunto a warranty is annexed is impleaded and vouch, and judgment is given against him, and for him to recover in value, and he dieth before execution, the heir of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompense shall ensue the loss.

GODBOLD v. FREESTONE.

NISI PRIUS, COMMON PLEAS. 1694.

[Reported 3 Lev. 406.]

EJECTMENT, and Not guilty, tried before *Holt*, Chief Justice, at Suffolk Assizes, he being of opinion for the plaintiff but doubting, a verdict was by his direction given for the plaintiff, but by consent of parties a case was made to be argued before him at his chambers at Serjeants-Inn, and according to his opinion there, either the judgment to be entered or the verdict to be stayed; and the case was this. A man seised of lands by descent *a parte materna*, makes a feoffment of all the lands to uses, viz. of Blackacre to the use of himself for life, the remainder to his wife for her life, the remainder to the heirs of his body on his wife begotten, the remainder to his right heirs. And of Whiteacre to the use of himself for 99 years if he so long lived, the remainder to trustees for his life, remainder to his wife for her life, remainder to his first and so to his tenth sons in tail, remainder to him and his heirs; the husband and wife are both dead without issue; and if the heirs *a parte paterna* or *a parte materna* should have the lands? was the question. And now upon argument at his chamber he changed the opinion he was of at the assizes, and held that the heir *a parte materna* should have the whole; and he did not make any difference between the cases, though the one is to himself for life, and the other for years: and Co. Lit. 13, 23, was cited, that where one takes an estate to himself for years, the remainder to his heirs, this is a new estate in him and not the ancient reversion; otherwise when he takes an estate for life, the remainder to his heirs; and Hob. 33 and Dy. 134 a, 163, where it is held, that when a man seised *a parte materna* makes a feoffment, or levies a fine, &c. and expressly declares the use to him and his heirs; this shall be to the use of his heirs *a parte paterna*:

¹ The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. — Harg. note.

otherwise where he does not expressly declare the use, but levies a fine, &c. without an express declaration of the use, there the use shall be the same it was before without any alteration. But on the other part were cited, 5 E. 4, 7, 2 Co. *Bingham's Case*, that it is all one be the use expressed or not; the word heirs shall be heirs of the same quality as before: and of that opinion was the Chief Justice, and ruled the *postea* to be delivered. But the heir *a parte paterna*, not being satisfied with this opinion, brought a new ejectment, which is entered Hill. 6 W. 3, C. B. Rot. 306, where this whole matter was found specially, and there, upon argument and the authorities before recited, judgment was given by the whole court, viz. TREBY, NEVIL, and the two POWELS, justices, for the heir *a parte materna* for the whole: and they did not differ the cases where the estate was limited to the ancestor for years, or for life, the remainder to him in fee, for in both these cases the fee is the old reversion and shall go to the heirs *a parte materna*. Nor did they admit the difference where the use is expressly limited by the deed, or implied by law without any express limitations; but that in both cases the fee remains in the donor, and was never drawn out of him. And that it neither merged the estate for life or for years, but that both are preserved by the mesne remainders over, which come between those estates and the reversion, as was held in the *Earl of Bedford's Case*, Poph. 3; Mo. § 719, 2, and Pasch. 179; Pl. 17, Roll. 2 Abr. 418, the same case; where till John Lord Russel in whom the next reversion in tail was, both the term for years and also the reversion in fee stood distinct in the earl, viz. the term for 40 years and the reversion in fee; and in *Plunket and Holme's Case*, *intra* Hill. 1658, Rot. 521, B. R. *sed adjornat* Mich. 13 Car. 2, where a feme devised lands to her son and heir Thomas, and if he died without issue living Leonard, to Leonard and his heirs; but if he had issue living at his death, to him and his heirs, there the fee descending upon Thomas did not merge his estate for life, but it was preserved by the contingent possibilities coming between his estate for life and the fee; and seeing that Holt had before delivered his opinion the same way, no writ of error was brought, and so the case rested. *Pemberton* for the heirs *a parte materna*, *Levinz* for the heirs *a parte paterna* in both places.¹

GODOLPHIN v. ABINGDON.

CHANCERY. 1740.

[*Reported 2 Atk. 57.*]

WHERE, said LORD CHANCELLOR [LORD HARDWICKE], a limitation is to A. for life, to his wife for life, to trustees to preserve contingent remainders, to the first and every other son in tail, remainder to his

¹ And see *Abbot v. Burton*, 2 Salk. 590 (1708); *Roe d. Crow v. Baldwre*, 5 T. R. 104 (1798).

own right heirs ; it will be absurd to say, that by a conveyance of lands, or by use, or by devise, the last limitation shall make the right heirs purchasers, and by that means prevent the reversion from being assets to satisfy the son's debts ; for according to the doctrine laid down in the case of *Counden and Clerke*, Hobart 29, the limitation to the right heirs will be but a reversion, and will vest also in the son ; for it is a positive rule, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase, by any form of conveyance whatsoever. The same case is reported in Moore 860, but the point is wrong stated.¹

B. *By Devise.*

BEAR'S CASE.

COMMON PLEAS. 1588.

[Reported 1 Leon. 112.]

A FORMEDON in the descender was brought by Samuel Bear, James Bear, and John Bear of lands in gavelkind ; and the warranty of their ancestor was pleaded against them in bar, upon which they were at issue, if assets by descent. And it was found by special verdict, that Thomas, father of the demandants, was seised in fee of the lands supposed to be descended to the demandants, being of the nature of gavelkind, and devised the same to the demandants, being his heirs, by the custom, and to their heirs equally to be divided amongst them : And if the demandants shall be accounted to be in of the lands by descent, or devise, was the question ; for if by devise, then they shall not be assets. *Anderson*, Let us consider the devise by itself without the words (equally to be divided amongst them). And I conceive that they shall be in by the devise, for they are now joint-tenants, and the survivor shall have the whole, whereas if the lands shall be holden in law to have descended, they should be parceners, and so as it were tenants in common. And although the words subsequent, equally amongst them to be divided, makes them tenants in common, yet that doth not amend the matter ; and so also was the opinion of WINDHAM and RHODES, Justices.²

¹ On the descent of the equitable fee when land is settled in trust for the settlor and his heirs, see Ames, *Cases on Trusts* (2d ed.), pp. 351 *et seq.* Cf. also *Davis v. Kirk*, 2 K. & J. 391 (1856), *post*.

When the legal estate descends from one parent, and the equitable from the other, the land descends according to the legal estate. "There is no equity between the different classes of heirs." — *Per* LEACH, V. C., in *Langley v. Sneyd*, 1 S. & St. 45, 55 (1822), and see *Goodright v. Wells*, 2 Doug. 771 (1781) ; *In re Douglas*, L. R. 28 Ch. D. 327 (1884).

See *Holme v. Shinn*, 62 N. J. Eq. 1 (1901).

² *Gilpin v. Hollingsworth*, 3 Md. 190 (1852), *accord*.

CLERK v. SMITH.

COMMON PLEAS. 1699.

[Reported 1 Salk. 241.]

IN ejectment on a special verdict the case was, J. S. devised lands to his daughter's son [who was also his heir] and to his heirs, upon condition that he should pay £200 to such a person out of the said lands, as the wife of the devisor would appoint by her deed. The grandson entered, and the wife made no appointment; then the grandson died seised, leaving an heir *a parte materna*, under whom the plaintiff claimed, and an heir *a parte paterna*, under whom the defendant claimed. The question was, Whether the grandson was in by descent, or in by purchase under the will: And it was adjudged, that he was in by descent, and not by purchase, for the devise gives him the same estate the law would have given him, under a possibility of being charged, which never happened; by consequence, as the grandson took it as heir *a parte materna*, he shall transmit it in the same manner to his heirs *a parte materna*: And TREBY, C. J., and POWELL, J., denied *Gilpin's Case*, Cro. Car. 161. *Vide* 2 Mod. 286; Dy. 124; 3 Leon. 64, 70; Cro. El. 833, 919; Mo. 644; Vau. 271; Dy. 371; Hard. 204; 1 Roll. Abr. 626.

SCOTT v. SCOTT.

CHANCERY. 1759.

[Reported Ambler. 383.]

SCOTT devised to Henry, his eldest son, and only son by a former wife, and to his heirs and assigns, all other his real estate not before devised: nevertheless, in case he should die without issue, not having attained 21, then, from and immediately after his death under age and without issue, unto the testator's son William, and the heirs male of his body, with remainders over.

The eldest son attained 21.

The specialty creditors (not having a lien on the real estate) having exhausted the personal estate in satisfaction of their demands, the legatees contended to stand in their place, and come upon the real estate.

Q. Whether the eldest son took by devise or descent? In the latter case, the legatees would be entitled; in the former, not.

HENLEY, Lord Keeper, after having taken time to this day, gave his opinion, That the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not.¹

ALLEN v. HEBER.

KING'S BENCH. 1748.

[Reported 1 W. Bl. 22.]

ACTION of debt on the bond of the father, to whom the defendant is heir. Plea, *Riens per descent*. The fact was, that the father had devised his lands to the defendant charged with debts. *Qu.* If this makes him a purchaser? For plaintiff: held, Hob. 30, that it will not make the heir a purchaser. But if the tenure or quality of the estate were altered, it had been otherwise: Dyer 124; Styl. 148; *Hedger and Row*, 3 Lev. 127, a devise to heir *ex parte materna* of no effect. Moor 644; Cro. Eliz. 919; Lutw. 797; Salk. 241. For defendant were cited Cro. Car. 161; 2 Mod. 286, *Brittam and Charnock*.

PER TOTAM CURIAM. If the tenure or quality of the estate be altered, the heir is a purchaser; but a charge on the estate does not alter the manner of the heir's taking the land. A devise is void, where it gives the same as would be taken by descent; 1 Ld. Raym. 728.

Judgment for the plaintiff.

HURST v. WINCHELSEA.

KING'S BENCH. 1759.

[Reported 1 W. Bl. 187.]

THIS was a case stated from Chancery for the opinion of the Court of King's Bench, and appeared to be this,—Thomas Herbert, by will duly executed, devised to his wife Elizabeth all his lands, &c. in fee-simple. — Elizabeth (on his death) married a second husband; but, previous to such second marriage, settled the said estates to use of herself for life; then to Thomas Herbert, her own son by the first marriage, for his life, and so on to his issue in strict settlement; then in remainder to such person or persons as she should by deed or will, notwithstanding any coverture, appoint [and in default of such

¹ a. c. 1 Eden, 458. See Serjeant Hill's MS. note quoted in note to this case in Blunt's edition of Ambler. The learned serjeant says: "The determination in this case is right; but the reason given for it is wrong." — Ed.

appointment, to the said Elizabeth, her heirs and assigns].¹ After the second marriage she made a will, wherein she devised *all her estate* to said Thomas Herbert (charged with several pecuniary legacies), and died, living her second husband. Afterwards, Thomas Herbert died, *sans* issue and intestate. And the question was, Whether this estate should descend to his heir, *ex parte paterna* or *materna*? or whether the remainder in fee vested in him by descent from Elizabeth his mother, in which case it would go to the maternal heir; or whether it vested by the devise, operating as an appointment under the settlement, in which case, Thomas Herbert would be a purchaser, and the lands would descend to the paternal heir.

The Court, after hearing two arguments, declared they should certify that it descended to the maternal heir of Thomas Herbert; it being a known rule, that a common devise in fee-simple to an heir-at-law, gives him no estate at all, he being adjudged in by descent; and it having also been determined in the case of the *Duke of Marlborough and Lord Godolphin*, in Chancery, 2 Ves. S. 61, 73, that an appointment by will is subject to the same rules as a common devise.

SMITH d. DAVIS v. SAUNDERS.

COMMON PLEAS. 1771.

[Reported 2 W. Bl. 736.]

EJECTMENT: special case. Robert Everden, seised in fee of the lands in question and other lands, on the 14th of September, 1753, devised the lands in question "to his son, Henry Everden, and his wife, Elizabeth, for their joint lives, and the survivor of them; and, after the decease of the survivor, to their eldest son and his heirs forever; and, if they *leave* no male issue, to their daughters and their heirs forever. And if they die without issue, then he gave, bequeathed, and devised the same to his right heirs forever." Afterwards he devised to his son-in-law, Humphrey Davis (the lessor of the plaintiff), "All his estates, lands, tenements, and premises thereunto belonging, *not thereinbefore devised, bequeathed, &c.*, to hold to him, his heirs, and assigns forever;" in trust to sell the same, and, after payment of so much of his debts, funeral expenses, and all other necessary expenses as his personal estate could not extend to pay, out of the produce thereof to pay certain specific and pecuniary legacies to his children; and to divide the residue equally among his three sons and five daughters. And then devises "all the residue and remainder of his estate, both real and personal, of what nature or kind soever, unto his son-in-law, the said Humphrey Davis, his heirs, executors, administrators,

¹ This is the correct form, as appears from Lord Kenyon's note of the case, 2 Kenyon, 444.

and assigns forever." The testator died on the 21st of February, 1754, leaving Henry, his eldest son and heir, two other sons, and five daughters. Henry (who survived his wife, Elizabeth) died on the 17th of September, 1769, and never had any issue. *Qu.* Whether the said Humphrey Davis, under either of the clauses in this will, is entitled to recover?

Glyn, for the plaintiff.

Davy, for defendant.

DE GREY, C. J. There are some propositions clearly established, which will give light to this case. Personal estate, being of a fluctuating nature, must go to a residuary legatee in the same state as it happens to be at the death of the testator. Not so real estates, which are of a more permanent nature; for there only such will pass by a residuary devise as the testator really meant to devise at the time of making his will. Therefore, in the case of *Doe and Underdown* [Willes, 293], an estate that lapsed afterwards by the death of a devisee did not go to the devisee of the *residuum*. Again it is certain, that a reversionary interest, which the testator then has, will (if nothing be mentioned of it) pass by a residuary devise. And there may be cases where a reversion of an estate devised to a man's own heirs may pass to a residuary devisee under the general clause, and others where it will not. It is always a question of construction; and in *Doe and Russel* I think the court construed it right. No argument is to be drawn from the position of clauses in a will, but all are to be taken together. Neither is the present question upon the *legal operation* of a devise to a man's right heirs, but upon the testator's *intention* by such devise. It is said that the devise to the heir is nugatory, and must be rejected. But there is as much reason to reject the residuary devise as nugatory as the other. It is said that the devise of the reversion being a nullity, it falls into the *residuum* as being undevised. But it would rather fall under the second clause; for all undevised estates are subject to the trust, which this is not now contended to be. The whole is merely a question of intention, and you can never infer an intention from a sweeping residuary clause. The intention of the testator is clearly, that his heir at law should have the land, failing the issue of his body. As for authority: in *Amesbury and Brown*, 25th May, 1750; testatrix, having four sisters, devises particular estates to them, with remainder to her own right heirs. Afterwards, a general residuary clause to one of the sisters; and [she] had no other real estate. One of the particular estates determines. Lord Hardwicke held, that the reversion did not pass by this residuary clause, and that though the devise may not operate to make the heir take it by purchase, yet it is in the nature of an exception out of the residuary clause. This case was recognized and approved by Lord Northington in *Robinson and Knight*, 12th July, 1762, 2 Eden, 155, which was also a case of a residuary devise, and determined upon intention merely. I am therefore of opinion with the defendant.

GOULD, J., of the same opinion.

BLACKSTONE, J., of the same opinion. Here are three dispositions. The first clause devises specific lands to his son and daughter in tail, with remainder to his own right heirs. The second devises such estates in point of locality as he had not before devised, to Davis, to be sold for the benefit of his younger children. The estate in question cannot come under this description, for it is previously devised. The third clause devises such estates, as well in point of interest as locality, as he had not before devised, to Davis absolutely in fee. For *residue* and *remainder* are relative expressions, and must refer to what had been before devised. Whether the devise of the reversion to his right heirs could, in point of law, take effect or not, it is in fact devised; and by such devise *de facto* it is (as Lord Hardwicke expresses it) excepted out of the general residuary clause. The residuary devise would extend to any latent reversions he might have in him, but not to those which he has expressly disposed of otherwise, unless there be special circumstances, as in *Doe and Russel*.

NARES, J., having been of counsel in the cause, gave no opinion.

*Judgment for the defendant.*¹

CHAPLIN v. LEROUX.

KING'S BENCH. 1816.

[*Reported 5 M. & S. 14.*]

COVENANT for not repairing, on a lease for 21 years, which expired at Lady Day, 1807, made by the father of the plaintiff to the defendant. And the plaintiff declares, that his father was seised of part of the demised premises in fee, and of the residue, by copy of court-roll held of the manor of Tottenham in fee-simple, at the will of the lord, according to the custom of the manor; that he surrendered the copyhold part to the use of his will, and by his will devised the whole premises to his wife for life, provided she did not marry; and died seised, leaving his said wife, and the plaintiff, his only son and heir at law, him surviving; and that afterwards, and before the breach of covenant, the said wife died, and the said demised premises, with the appurtenances, *descended to the plaintiff, as only son and heir at law of the lessor*, whereby the plaintiff was, and continually hitherto hath been, and still is seised, &c.

Plea, that the demised premises, with the appurtenances, did not descend to the plaintiff as the only son and heir at law of the lessor, *modo et forma*.

On the trial, at the sittings after last Trinity Term, a verdict was found for the plaintiff, subject to the opinion of the court, on the ques-

¹ s. r. *Doe d. Davis v. Saunders*, Cowp. 420 (1776).

tion whether the plaintiff took by descent, or by devise under the will of his father, by which the father devised all his lands, as well freehold and leasehold, as copyhold, with their appurtenances, unto his wife for life, provided she did not marry, with power to grant building leases for 61 years, charged during that time with the payment of the yearly sum of £50 to his son, the plaintiff, if he should so long live, by four equal quarterly payments, and also finding him in board, washing, and lodging during his stay at the university, and during his studies in the profession of the law in London or otherwise, until such time as he should arrive to the age of 27 years; and also charged with the payment of the further yearly sum of £30, during his wife's life, unto his daughter Sarah, the wife of George Thompson, if she should so long live, and payable quarterly; and in case his said wife should marry, then and from the time of such marriage he devised all his said lands unto his said son, charged with the payment of the said yearly sum of £30 unto his daughter Sarah, in like manner as if his wife had not married; and also charged with the payment of the yearly sum of £100 to his wife during her life, payable quarterly; and from and after the decease of his said wife, he devised his said estates unto his said son, charged with the payment of the yearly sum of £100 unto his daughter Sarah during her life, payable quarterly. And upon the decease of the survivor of his wife and daughter he bequeathed the sum of £1500, to be equally divided between all the children of his said daughter then living, if more than one, and if there should be only one child, then the whole to go to such child; and in case she should not have any children or child living at the time of her decease, then he gave the said sum of £1500 to be disposed of by his said daughter in such manner as she should, by any deed or will attested by two witnesses, notwithstanding her present or any future coverture, appoint; and for want of such appointment the same to go to her executors and administrators. And it was his will that the said sum of £1500 should be paid within one year after the decease of his wife and daughter; and in default of payment, either of the yearly sum of £100 to his daughter in manner above mentioned, or of the sum of £1500, within the time above specified, he devised all his said lands, as well freehold and leasehold as copyhold, with the appurtenances, unto the said G. Thompson, his executors, administrators, and assigns, in trust, upon such default of payment, to raise and pay the said yearly sum of £100 out of the rents and profits, and the said sum of £1500 by sale or mortgage of a sufficient part of his said lands, and subject to the said several charges and trust he gave the said lands, after the decease of his wife, to his said son, his heirs, executors, administrators, and assigns. The testator's said daughter is still living.

If the court should be of opinion that the plaintiff took by descent, the verdict to stand; if not, a nonsuit to be entered.

Gaselee, for the plaintiff.

Marryat, contra.

LORD ELLENBOROUGH, C. J. If the estate devised to the trustee be an executory devise, the law will cast the estate of the heir on him by descent, until the contingency happens; if the trustee's estate be not an executory devise, I do not see that there is necessarily such an estate of freehold given to him as to break in upon and alter the quality of the estate which the heir would otherwise take.

BATLEY, J. I am of the same opinion. In all these cases it is desirable that the heir should be in by descent, rather than by purchase; because it is convenient that the property should be assets in the hands of the heir. And the general rule is, that where the heir takes the same estate in nature and quality which the law would give him, he takes by descent. It appears by Mr. Ford's MS. note of *Allam v. Heber*, though this is not noticed either in *Strange* (Str. 1270), or Blackstone's report of that case (1 Black. 22), that the court denied *Gilpin's Case*, Cro. Car. 161, to be law. Impeached, therefore, as *Gilpin's Case* is, as well by what I have just remarked, as by the authority of Treby, C. J., and Powell, J., it is competent to us to examine the case, and in examining it to ask this question: whether a fee mounted upon a fee turns the first into a base fee? I think that it does not. Here the plaintiff's estate was a good estate in fee, the last an executory devise.

HOLROYD, J., being connected with the parties, declined giving any opinion.¹

BIEDERMAN v. SEYMOUR.

CHANCERY. 1840.

[Reported 3 Beav. 363.]

THE MASTER OF THE ROLLS. [LORD LANGDALE.]² In this case the question reserved was, whether the real estate which the testator devised to his heir at law, is to be taken as real assets, for payment of debts, in priority to real estates, by the same will devised to other persons.

The devise to the heir is made subject to the payment of an annuity of £50 to the testator's sister during her life, and after her death to the payment of £1,000 to her two children.

Notwithstanding the devise, and notwithstanding the charges, the heir takes by descent. *Chaplin v. Leroux*, 5 M. & S. 14. For the purpose of making him take otherwise than by descent, the devise is said to be void; and it is argued for the defendants that the devise is void for all purposes: that no intention can be applied to it: that the

¹ In *Dos d. Pratt v. Timins*, 1 B. & Ald. 530 (1818), there was a devise to the heir, with an executory devise over in case he should not reach his majority. It was held that he took by descent. — ED.

² The opinion only is given.

attempted devise must be treated as a mere nullity, and the estate therein comprised be considered merely as descended estates, and therefore as assets to be applied for the payment of debts, in priority to estates effectually devised.

But whatever may be the origin of the rule, which gives to the heir by descent, that which the testator has intended to devise; whether the rule be derived from the supposed application of a principle that a man shall not have by gift that which is his own without gift, as some have supposed; or whether the rule be adopted for the benefit of third persons, as of the lord for the preservation of tenure, or of creditors for the payment of their debts; or simply, as Mr. Justice Bayley said in *Chaplin v. Leroux*, because it is convenient that the property should be assets in the hands of the heir; there seems to be no reason, why, as against the heir, the rule should be extended further than the principle requires.

It cannot be said of estates expressed to be devised to the heir, as of estates not mentioned in the will, that they are "quite out of the scope of the testator's intention, perfectly beside and independent of it," 2 Bro. C. C. 262; it is indeed clear that an estate which the testator says he devised to the heir, is within the testator's intention, and meant to be a benefit to the heir. There is nothing illegal in that intention, and if the rule be founded on the regard due to third persons, as creditors or otherwise, there seems no reason for its application between the heir and other objects of the testator's bounty; and if the effect of the devise be to procure for the heir a contribution from the other devised estates towards payment of debts, which would otherwise have had to be borne by descended estates alone, it cannot be said that the heir obtains by gift something which was his own, without gift.

Courts of justice ought to carry into effect the intentions of testators as far as they can consistently with the rules of law; and in this case, although the rule of law makes the devised estates assets in the hands of the heir, and the creditors may, therefore, resort to this estate in priority to others, and without being embarrassed with the necessity of seeking contribution from other devisees; yet, as it appears by the expressions which the testator has used, to have been his intention that the devisee, who is heir, should partake of his bounty as well as other devisees, there seems to be no reason why, without prejudice to the claims of creditors or others, the heir should not enjoy the like benefit which is given to other devisees; or why those who claim under the will, and do not appear to be more objects of the testator's bounty, should be permitted to defeat the expressed intention in favor of the heir.

I do not think that the testator's intention can be excluded from the consideration of this question. The intention is not to prevail against the rule of law for the benefit of third persons. A testator cannot, as against creditors, exempt his personal estate from payment of his debts, or prevent his real estates from being assets, by devising them to his

heir; but we may collect from his will an intention, that, as amongst those claiming under the will, the personal estate, or any portion of the real estate, shall be exonerated; and if there be an equal intention to give to devisees named, and the gift must be encroached upon by the liability of the subjects of them to pay debts, I think the doctrine that the heir, who is devisee, shall take by descent, does not afford a sufficient reason for saying, that the burden of the debts should not be borne ratably by the devisees, although one of them is heir; and I am of opinion that although the creditors have a right to resort to the estate devised to the heir, in priority to the other devised estates, yet that the heir will be entitled to contribution from the other devisees to the extent in which his estate may be exhausted by debts.

Mr. Pemberton and *Mr. Cankrien*, for the other devisees.

Mr. Dixon, for the heir at law.¹

DAVIS v. KIRK.

CHANCERY. 1855.

[Reported 2 K. & J. 391.]

WILLIAM HARDING, by his will, dated in 1845, gave and devised all his freehold and copyhold estates to Anthony Davis, his heirs and assigns, to hold the same unto and to the use of the said Anthony Davis, his heirs and assigns, upon trust to sell all those three closes therein specifically described, and to stand possessed of the moneys to arise from such sale, upon trust to pay all the said testator's debts, funeral and testamentary expenses; and in the next place to pay the residue thereof to the said testator's wife, Ann Harding; and as to all the rest, residue, and remainder of the said testator's real estate thereinbefore given and devised to his said trustee, upon trust to pay the rents and profits thereof unto the said Ann Harding for her life; and, after her decease, upon trust to convey the said residue of his the said testator's real estate unto such person as should answer the description of his heir-at-law; and the said testator appointed the said Anthony Davis executor of his said will.

The testator died shortly after the date of his will, and the said Ann Harding, his widow, died in 1853.

At the time of his death, the testator William Harding was seised in fee of copyhold lands besides those mentioned in the will, which had descended to him *ex parte materna*, and these were now claimed by his heir-at-law, and also adversely by his heir *ex parte materna*.

Mr. W. M. James, Q. C., and *Mr. Jessel*, for the plaintiffs.

Mr. Rolt, Q. C., and *Mr. Speed*, for the heir *ex parte materna*.

Mr. Giffard, for other parties.

¹ *Ellis v. Page*, 7 Cush. 161 (Mass., 1851), is *contra*. Cf. *Randall v. Marble*, 69 Me 310 (1879).

Mr. Willcock, Q. C., and *Mr. Karlake*, for the heir-at-law, who was also the customary heir of the testator.

VICE CHANCELLOR SIR W. PAGE WOOD, without hearing the counsel for the defendants, gave judgment as follows :—

I do not think that there is any doubt about this case. I have been looking at the case of *Hurris v. The Bishop of Lincoln*, 2 P. Wms. 135. The report of it is in the shape of an argument between the bar and the court, counsel making an observation and the court answering it. I find there “it was objected, that, if the will should be construed in such manner as to entitle the heir of the mother’s mother to the estate, such will would be void and nugatory, and the testator all this while would be doing of nothing, because, without any will, the premises would go to the heir of the mother’s mother, who was the heir-at-law to this estate, the heir of the mother’s father having none of the blood of the first purchaser. To which the court said, that the testator giving by his will several annuities and charities, and then saying that the residue of the profits should go to the right heirs of the mother’s side, it was the same thing as if he had said, ‘so far I dispose of my estate, and let so much of it go from my heir who otherwise would have had it, but I will not dispose of it any further from the heirs at law of the mother’s side, whence it came, and where it would go in case I should not give it away.’” In other words, the court treated it as not being a devise at all, but considered that the heir took by his better title ; and that was the principle of the decision.

I think that the answer to the case of *Godbold v. Freestone*, 3 Lev. 406, which is the only case that touches this, is, that the use is the old use. Here the devise is an express devise, which vested the whole fee simple in the trustees, and gave it away from the heir. The whole estate is devised away from the heir, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator’s heir-at-law. The expression “heir-at-law” is somewhat strong ; but, independently of that, the fact of the testator having divested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir-at-law of the testator. I think that there is not any authority precisely in point ; but the principle must be, that, when once the descent is broken by a devise of the whole fee simple to trustees, upon trust to convey it to the testator’s heir, they are bound to convey it to the person who is heir of the testator according to the common law.¹

¹ See *Burr v. Sim*, 1 Whart. 252 (Pa., 1836).

NOTE.—“Upon recollecting the case on Mrs. F.’s will, lately laid before me by Mr. W., it now strikes me that the opinion I delivered upon it is, in one part, not well founded ; and, though I have not the case, nor a copy of it, by me, my memory sup-

SECTION III.

POSTHUMOUS HEIR.

Co. Lrr. 11 b. So it is if a man hath issue a son and a daughter, the son purchaseth land in fee and dieth without issue, the daughter shall inherit the land; but if the father hath afterward issue a son, this son shall enter into the land as heir to his brother, and if he hath issue a daughter and no son, she shall be coparcener with her sister.¹

plies me with all that is necessary to enable me to make what, I think, the requisite correction.

"The devise by Mrs. F. to her two sons, if I remember right, was under a power in her marriage-settlement. Now, regularly, whoever takes under an *execution of a power* contained in any conveyance or settlement, takes under such conveyance or settlement itself; and, if this rule extended to the present case, both the sons must have taken as under the settlement, and consequently by *purchase*; in which case, their heirs, *ex parte paterna*, would have been clearly entitled to the whole. But the rule, it seems, does not hold in a devise, under such a power, to the *heir-at-law* of the party executing it, where such heir would have taken the same estate by descent from that person in default of execution of the power. Vide *Hurst v. The Earl of Winchelsea*, 1 Black. Rep. 187. For there, according to the common rule in respect to devises to an heir-at-law, such heir shall be in by descent, and not by purchase.

"This consideration only affects the moiety of the eldest son; for, as to that devised to the youngest, he could not take it otherwise than by *purchase*, as he was not heir of the testatrix; and, as he took by purchase, his share of course descended, either immediately from himself, or mediately through his brother (if his brother survived him), to his heir *ex parte paterna*: And, therefore, I think it clear, that the heir of the son, on the part of Mr. F. *their father*, is entitled to this moiety. But, as to the other moiety devised to the eldest son, it remains to be inquired, How the lands were limited by the settlement, in default of appointment by Mrs. F.? which, I believe, did not appear by the case stated. If they were not limited to her *in fee*, so that her eldest son would not have taken if there had been no will, then, I conceive, he took as under the settlement, by virtue of the execution of the power contained therein; for he could not, in that case, take by descent; and then, as he took by *purchase*, his moiety also descended to his heir *ex parte paterna*; and then the title to the whole will stand as supposed in my former opinion. But if the lands were, by the settlement, limited to Mrs. F. *in fee*, in default of appointment, so that her eldest son would have taken as heir, if she had not executed her power, then, I conceive, under the authority of the case above cited, he took by *descent*, and not by the will; unless a devise to an heir-at-law, and another as tenants in common, prevents the descent as to the moiety devised to such heir, and makes him take by purchase under the will.

"Now, I believe, in my former opinion, I supposed this circumstance of the *tenancy in common* to be an obstacle to his taking by descent, and that, to do so, he must have taken solely as his mother held it. But this latter proposition is certainly wrong; for, suppose a testator devises a moiety, or any other undivided share, of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining share will of course descend to his heir-at-law, and he must hold it in common with

¹ See *Goodale v. Gawthorne*, 2 Sm. & G. 375 (1854); *Richards v. Richards*, H. R. V. Johns. 754 (1860); *In re Mowlem*, L. R. 18 Eq. 9 (1874); *Bates v. Brown*, 5 Wall. 710 (U. S. 1866).

the devisee of the undivided share devised. It is clear, therefore, that an heir may take by *descent*, as *tenant in common* with a devisee, an undivided part of the estate which his ancestor *was solely seised of*; and it appears to me to be immaterial, whether the share he so takes is *expressly devised to him*, or left unnoticed, by the *will*; for, if expressly devised, he takes it in *common*, and, if not noticed, he takes it in the *same manner*; and a devise to two or more as *tenants in common*, is in effect a devise of one undivided part to *one*, and of *another undivided part to the other*; so that under such a devise to an heir and another as *tenants in common*, the heir takes as if *one undivided moiety* were devised to *the other*, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case he would have taken by *descent*; and therefore, the same estate being devised to him in such residue as he would have taken by *descent*, I think, the general rule, respecting devises to an heir, extends to it.

"It has indeed been held, that a devise to the *heir and another* makes the heir a purchaser; but that seems to be on account of the *joint tenancy* and benefit of *survivorship* to the stranger. And it appears, that under a devise to *two co-heirs*, they take as joint-tenants by the will, and not by *descent*; and so in a devise to them *in common*, they take as *tenants in common*, and not by *descent*. But, it is evident, under either of these tenures, they take *every part* of the land devised in a different manner than by *descent*; whereas, in the case of a devise to the heir *and another*, as *tenants in common*, the heir seems to take the *part devised to him*, just in the same manner as if it had been left to *descend* to him. I therefore, upon this consideration of the point, am of opinion, that the devise being to the two sons, as *tenants in common*, was no obstacle to the eldest taking his *moiety by descent*; and consequently, that if the lands were settled on his mother *in fee*, so as to descend from her to him, in default of appointment, he took his moiety by *descent*, and not by the will or settlement; and, in that case, his heir *ex parte materna* will be entitled to his said moiety." — *Fearne, Post. Works*, 128-132.

In *Ellis v. Page*, 7 Cush. 161 (1851), land was devised to trustees on certain trusts, and on failure of these trusts in trust to convey the land to the testator's heirs-at-law. The trusts failed, and it was held that the heirs took by *descent*, and not by devise, and that therefore, under a Massachusetts Statute, the land could be sold to pay legacies. The decision, it is submitted, is unsound: (1) because the devise of the legal estate to the trustees broke the *descent*, *Davis v. Kirk*, *ante*; (2) because even if the devise had been to the heirs directly, the doctrine of *Biederman v. Seymour*, *ante*, is good sense and good law.

NOTE. — OCCUPANCY. At common law if an estate for the life of A. was conveyed to B., and B. died, living A., any occupant of the land was entitled to retain the possession so long as the *cetui que vie* lived. Co. Lit. 41 b. And see *Skelliton v. Hay*, Cro. Jac. 554 (1618).

If an estate for the life of A. was conveyed to B. and his heirs, or to B. and the heirs of his body, then, on B.'s death, the persons answering such designation became entitled as special occupants. *Salter v. Boteler*, Moore, 664 (1602); *Bowles v. Poore*, Cro. Jac. 282 (1610); *Low v. Burron*, 3 P. Wms. 262 (1784). See also *Ripley v. Waterworth*, 7 Ves. 425 (1802); *Doe d. Lewis v. Lewis*, 9 M. & W. 662 (1842); *Wall v. Byrne*, 2 J. & L. 118 (1845); *In re Barber's Estates*, 18 Ch. D. 624 (1881); Sugden, Powers (8th ed.), pp. 198-195.

By St. 29 Car. II. c. 3, § 12 (1677), and 14 Geo. II. c. 20, § 9 (1740), it was provided that the tenant of an estate *pur autre vie* might devise such estate, and that, if there were no devisee or special occupant, the term should be applied and distributed as part of the personal estate of the tenant.

See Stimson, Am. Stat. Law, § 1835.

NOTE. — DISTRIBUTION. The passing of personal property on intestacy might have been here considered, but the administration of intestate estates is so closely connected with that of testate estates that it will be found convenient to consider them subsequently together.

CHAPTER III.

THE MAKING, REVOCATION, AND REPUBLICATION OF WILLS.

SECTION I.

STATUTES.

32 HEN. VIII. c. 1 (1540). — [Be it enacted¹] that all and every person and persons, having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knights service, from the twentieth day of July in the year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, Statute or other thing heretofore had, made or used to the contrary notwithstanding.

II. And that all and every person and persons, having manors, lands, tenements or hereditaments, holden of the king our sovereign lord, his heirs or successors, in socage, or of the nature of socage tenure in chief, and having any manors, lands, tenements or hereditaments, holden of any other person or persons in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of July in the said year of our Lord God M.D.XL. shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any

¹ The preamble is omitted.

law, Statute, custom or other thing heretofore had, made or used to the contrary notwithstanding.

III. Saving alway and reserving to the King our sovereign lord, his heirs and successors, all his right, title and interest of *primer seisin* and reliefs, and also all other rights and duties for tenures in socage, or of the nature of socage tenure in chief, as heretofore hath been used and accustomed, (2) the same manors, lands, tenements or hereditaments to be taken, had and sued out of and from the hands of his highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such and like manner and form, as hath been used by any heir or heirs before the making of this Statute; (3) and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the King our sovereign lord in socage, or of the nature of socage tenure in chief, whereof there shall be any alteration of freehold or inheritance, made by will or otherwise, as is aforesaid.¹

34 & 35 HEN. VIII. c. 5 (1542). — I. Where in the last Parliament begun and holden at Westminster the thirty-eighth day of April in the thirty-first year of the King's most gracious reign, and thereby divers prorogations holden and continued unto the twenty-fourth day of July in the thirty-second year of his said reign, it was by the King's most gracious and liberal disposition showed towards his most humble and obedient subjects, ordained and enacted how and in what manner lands, tenements, and other hereditaments might be by will or testament in writing, or otherwise by any act or acts lawfully executed in the life of every person, given, disposed, willed or devised, for the advancement of the wife, preferment of the children, payment of debts of every such person, or otherwise at his will and pleasure, as in the same Act more plainly is declared: (2) sithen the making of which Estatute, divers doubts, questions and ambiguities have risen, been moved, and grown, by diversity of opinions, taken in and upon the exposition of the letter of the same Estatute.

II. For a plain declaration and explanation whereof, and to the intent and purpose that the King's obedient and loving subjects shall and may take the commodity and advantage of the King's said gracious and liberal disposition, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, most humbly beseechen the King's majesty, that the meaning of the letter of the same Estatute, concerning such matters hereafter rehearsed, may be by the authority of this present Parliament enacted, taken, expounded, judged, declared and explained in manner and form following:

III. First, where it is contained in the same former Statute, within divers articles and branches of the same, that all and singular person

¹ See 34 & 35 Hen. VIII. c. 5, § 13. By the other sections of this Act of 32 Hen. VIII. it is provided that two thirds of land held by knight service may be devised.

and persons having any manors, lands, tenements or hereditaments of the estate of inheritance, should have full and free liberty, power and authority to give, will, dispose or assign, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, his manors, lands, tenements or hereditaments, or any of them, in such manner and form as in the same former Act more at large it doth appear. Which words *of estate of inheritance*, by the authority of this present Parliament, is and shall be declared, expounded, taken and judged of estates in fee-simple only.

IV. And also that all and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, of and in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, and having no manors, lands, tenements or hereditaments holden of the King, his heirs or successors, or of any other person or persons by knights-service, shall have full and free liberty, power and authority to give, dispose, will or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, by himself solely, or by himself and other jointly, severally or particularly, or by all those ways, or any of them, as much as in him of right is or shall be, all his said manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons or other profits or commodities out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure; any clause in the said former Act notwithstanding.

XIV. And it is further declared and enacted by the authority aforesaid, that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law.

29 CAR. II. c. 3 (1677). — V. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator

himself, or in his presence and by his directions and consent; (2) but, all devises and bequests of lands and tenements shall remain and continue in force, until the same be burned, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

XII. And for the amendment of the law in the particulars following; (2) be it further enacted by the authority aforesaid, that from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; (3) and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee-simple; (4) and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury; (2) be it enacted by the authority aforesaid, that from and after the aforesaid four and twentieth day of June no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

XXI. And be it further enacted, that no letters testamentary or probate of any nuncupative will shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please.

XXII. And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.

XXIII. Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the making of this Act.

XXIV. And it is hereby declared, that nothing in this Act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect; subject nevertheless to the rules and directions of this Act.

25 GEO. II. c. 6 (1752).—Whereas by an Act made in the twenty-ninth year of the reign of his late majesty King Charles the Second, intituled, an *Act for Prevention of Frauds and Perjuries*; it is amongst other things enacted, that from and after the twenty-fourth day of June in the year of our Lord one thousand six hundred and seventy-seven, all devises and bequests of any lands or tenements devisable, either by force of the Statute of Wills, or by that Statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said Act; therefore, for avoiding the same, be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that if any person shall attest the execution of any will or codicil which shall be made after the twenty-fourth day of June in the year of our Lord one thousand seven hundred and fifty-two, to whom any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person

shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil.

II. And be it further enacted by the authority aforesaid, that in case, by any will or codicil already made or hereafter to be made, any lands, tenements or hereditaments are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said Act.

X. And whereas in some of the British Colonies or plantations in America, the said Act of the twenty-ninth year of the reign of King Charles the Second, has been received for law, or Acts of Assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements and hereditaments have been required: therefore, to prevent and avoid doubts which may arise in the said colonies or plantations, in relation to the attestation of such devises of lands, tenements and hereditaments; be it enacted by the authority aforesaid, that this Act, and every clause, matter and thing therein contained, shall extend to such of the said colonies and plantations, where the said Act of the twenty-ninth year of the reign of King Charles the Second, is by Act of Assembly made, or by usage received as law, or where by Act of Assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to devises of lands, tenements or hereditaments; and shall have the same force and effect in the construction of or for the avoiding of doubts upon the said Acts of Assembly, and laws of the said colonies and plantations, as the same ought to have in the construction of or for the avoiding of doubts upon the said Act of the twenty-ninth year of the reign of King Charles the Second in England.

7 Wm. IV. & 1 Vicr. c. 26 (1837).—Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a*

revenue upon His Majesty in lieu thereof, or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land*; and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the Explanation of Wills*; and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins*; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate, *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law, and the better Advancement of Justice*, as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King

George the Second, intituled *An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries,"* as relates to estates *pur autre vie*; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America*, except so far as relates to His Majesty's Colonies and Plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates*; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will*, shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates *pur autre vie*, to which this Act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the

same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall, be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.¹

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

¹ See 15 & 16 Vict. c. 24.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distribution).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other Act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an Act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

NOTE.—For the American Statutes, see Stimson, Am. Stat. Law, §§ 2600 *et seq.*

SECTION II.

THE MAKING OF WILLS.

A. *Fraud and Undue Influence.*

NOTE. — A large part of the litigation on wills arises upon the question of mental capacity; but the decision of this question turns mostly on matters of fact, or on the law of evidence, which has properly no place here.

KENNELL v. ABBOTT.

CHANCERY. 1799.

[*Reported 4 Ves. 802.*]

JAMES HICKMAN by his will, dated the 18th of April, 1782, gave to his wife Catherine £300 4 per cent Consolidated Bank Annuities; and appointed her sole executrix. Upon his death she possessed herself of his personal estate; paid his debts, &c.; and exhibited the probate to the bank; but not applying to be at liberty to transfer the stock into her own name, it continued to stand in the name of the testator.

In 1788 a marriage ceremony was performed between Catherine Hickman and Edward Lovell: but that marriage was void; Lovell having been married in 1775; and his wife being living. He cohabited with his wife till 1781. By articles executed previously to the marriage ceremony with Catherine Hickman, dated the 3d of January, 1783, she agreed to transfer the said stock upon the trusts therein mentioned, with power to her to dispose of it after the decease of the survivor of herself and Lovell. She never discovered the invalidity of her marriage; and being seised to her and her heirs of a copyhold estate, which she had surrendered to the use of her will, and being possessed of a leasehold estate for a long term of years determinable upon lives, and of personal estate, she made her will, duly attested according to the Statute of Frauds, describing herself the wife of Edward Lovell; and by virtue of the power and authority given her before her marriage with her present husband Edward Lovell, she publishes and declares her last will and testament; giving the said £300 stock to her brother Thomas Abbott, in trust to pay the interest to her niece Betty Kennell for life; and after her decease the principal to be equally divided between her two daughters share and share alike. She gave some leasehold premises to her nephew Martin Togood, his executors and administrators. She gave a copyhold estate, which she had surrendered to the use of her will, to her brother Thomas Abbott and his heirs, in trust to sell, and out of the moneys arising therefrom to pay the following legacies: "to my husband the said Edward Lovell the sum of £150;" to her brother Thomas Abbott £20; to her nephew James Fabian, her niece Elizabeth Cox, and her nephew George Togood,

£10 each; and she directed these legacies to be paid within twelve months after her decease. She gave another leasehold estate to her great niece Catherine Kennell, her executors, &c., and she gave all her household goods, plate, furniture, and stock in husbandry, to her brother Thomas Abbott, his executors and administrators, in trust to sell, and out of the produce, to put in the life of her said great niece into the said leasehold premises, if she (the testatrix) should not do it in her life. She gave her wearing apparel and linen to her niece Betty Kennell; and as to the residue of the purchase-money arising from the sale of her said copyhold estate, household goods, and furniture, and all the rest, residue, and remainder, of her moneys, securities for money, personal estate and effects, whatsoever and wheresoever, that she should die possessed of, interested in, or entitled to, or whereby she had power to dispose by will, she gave to her said niece Betty Kennell, her executors and administrators, subject to her debts and funeral expenses; and she appointed Thomas Abbott guardian of the children of Betty Kennell, and appointed Betty Kennell executrix.

The testatrix died; leaving Edward Lovell surviving her, and John Abbott, her eldest brother, her heir-at-law. Betty Kennell proved her will: but the probate was limited to the £300 stock, and £100 stock supposed to be standing in the name of, and purchased by, the trustees, under the articles of the 3d of January, 1783. Edward Lovell died; leaving an infant son by his lawful wife Ann Lovell; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of Catherine Hickman; praying, that the trusts of her will may be established, except so far as relates to the bequest to Edward Lovell and the lapsed legacy to James Fabian, who died in the life of the testatrix, and to the guardianship of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The question arose upon the legacy of £150 given to Edward Lovell: which was claimed on the part of his infant son. Supposing that legacy void, it was claimed by the residuary legatee by the heir, and also by the next of kin.

Mr. Woodeson, for the plaintiffs.

Mr. Cox, for the defendant Lovell.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] This case has stood a long time; and I believe, the reason I have not been desired to give my judgment, is, that it has abated; and perhaps it may be unnecessary to give it. But as upon very full consideration I have made up my mind, it may be of use, that the parties may know my opinion, in case they think fit to revive it.

The cause arises upon the will of Catherine Hickman; who supposed herself to be married to Edward Lovell; with whom she had celebrated a marriage. It now appears that he was a married man at that time; therefore she is in fact a single woman; and it was a gross fraud as to her. She made her will in execution of the power given to her by the

articles executed previously to the supposed marriage; and not aware that she was a single woman. Upon that will the questions arise. The first question is, whether this legacy of £150 charged upon the produce of the sale of the copyhold estate devised in trust to be sold is or is not a legacy, which this man can claim under the circumstances that it is given to him as the husband of the testatrix; though he does not possess that character. I thought it a case rather novel in its circumstances, and that scarcely has afforded any decision in the law of England; though there are some *dicta* in the civil law, that seem to bear upon the point. The passage cited from the Code, I think, does not much apply. The passage in the Digest is: "*Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.*"

The meaning is, that a false reason given for the legacy is not of itself sufficient to destroy it: but there must be an exception of any fraud practised; from which it may be presumed, the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the civil law.

The question is, whether according to the law of England that can apply to a case like the present; and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this; but upon general principles I am of opinion, it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused; and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine, that, where from circumstances not moving from the legatee himself the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail: for circumstances of personal affection to the child might mix with it; and which might entitle him; though he might not fill that character in which the legacy is given. My decision therefore totally avoids such a point. Neither would I have it understood, that if a testator in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person.

He had certainly done this lady the grossest injury a man can do to a woman; and I am called upon now to determine, whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent; and to determine, that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy.

A case (*Ex parte Wallop*, 4 Bro. C. C. 90) something like this occurred lately; which took up so much time before the Lords Commissioners upon an application for a writ *de ventre inspiciendo* against a woman, who had lived with Mr. Fellowes, and had made him believe she had been brought to bed of several children: which he was weak enough to suppose his. It was not a question whether they were his children; for if so, I do not apprehend the decree would have been such as it was. But there were no such children. She had shown him children as hers, which were not hers; and he gave legacies to them, as her children by him. It was held, that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character in which he gave them the legacies; for they were not the children of that woman. Therefore, upon the principle I have mentioned from the Digest, and that ought to govern courts of justice, I am of opinion this legacy could not be claimed.

[The Master of the Rolls then considered the question, whether the legacy would fall into the residue, and he determined that it would. This part of the opinion is omitted.¹]

¹ "Here it is said that the fraud was not committed for the purpose of obtaining the will. I cannot agree in this. Though we term the conduct alleged in this case fraudulent concealment, it is equivalent to fraudulent misrepresentation. When the lady went through the ceremony of marriage with the testator, she in effect represented to him that she was capable of becoming his lawful wife, and every day while they were living together she must be taken as continuously representing to him that she was his lawful wife. If at the same time she knew that her former husband was alive, this was what the court would take notice of as a fraudulent misrepresentation. For what purpose were these representations made? To obtain all the benefits of the position of the testator's lawful wife, and a testamentary provision in case she survives her husband, is one of the advantages which a wife most naturally expects. The misrepresentations must, therefore, be treated as made, among other things, for the purpose of obtaining a will in her favor, and it makes no difference whether this particular advantage was actually present to her mind or not." — *Per MELLISH, L. J.*, in *Meluish v. Milon*, 8 Ch. Div. 27, 34, 35 (1876).

See *Rishton v. Cobb*, 5 Myl. & Cr. 145 (1839); *Re Boddington*, 50 L. T. R. N. s. 761 (1884); *Howell v. Troutman*, 8 Jones, 304 (N. C. 1860); *Case of Broderick's Will*, 21 Wall. 503, 510-512 (U. S. 1874).

WILKINSON v. JOUGHIN.

CHANCERY. 1866.

[Reported L. R. 2 Eq. 319.]

WILLIAM THOMPSON, who died in July, 1864, by his will dated the 20th of May, 1864, devised and bequeathed all his real and personal estate to the plaintiff and the defendant Joughin, whom he also appointed executors, upon trust "to permit my wife, Adelaide, to receive from my death the net annual income thereof during her life." And after her death the testator directed his trustees to sell his real estate, and to convert and get in his personal estate, and to invest the moneys to arise in trust for the benefit of his children; but if no child of his should attain the age of twenty-one, or be married, then upon trust to pay certain legacies; and as to the residue, "In trust for my step-daughter, Sarah Ward, for her absolute use. But in case she shall die without leaving issue, upon trust to pay the same moneys to John Wilkinson and my cousin, Anne Hammond, in equal shares. I direct that my wife shall out of the income of my said estate maintain, educate, and bring up my children until the age of twenty-one years (but my trustee shall not be obliged to see this direction fulfilled), and that she shall receive and enjoy such income as her separate estate, without the control or interference of any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same."

The testator left no issue him surviving. The bill alleged that on the 15th of October, 1849, Thomas Ward and Adelaide Ward (then Rowntree) were married at Great Grimsby, and that the defendant Sarah Ward was a child of that marriage; and that on the 20th of May, 1863, the defendant Adelaide Ward and the testator went through the ceremony of marriage at Liverpool—the defendant Adelaide Ward having represented herself to the testator as, and he having believed her to be, a widow—the defendant Thomas Ward, her husband, being then, and in March, 1865, when the bill was filed, alive. The plaintiff submitted to the judgment of the court, whether the defendant Adelaide Ward, or the defendant Thomas Ward, her husband, in her right, could take any interest under the will; and also what interest (if any) the defendant Sarah Ward took under it; and prayed that the trusts might be performed by the court, and for a declaration as to the rights of all persons interested under the will, and for an account and inquiries. The evidence, in the view taken of it by the court, sustained the conclusion that the misrepresentation by Adelaide Ward was wilful.

Mr. Malins, Q. C., and *Mr. Horsey*, for the plaintiff.

Mr. Bardswell, for the defendants, the Wards.

SIR JOHN STUART, V. C. In my opinion the bequest in favor of

Adelaide Ward is void. She has sworn in her answer that which has been distinctly disproved. The evidence shows that she imposed in a gross manner upon the testator. Therefore, there must be a declaration to the effect that the bequest to Adelaide Ward, the pretended wife of the testator, is wholly void, and then there must be the usual decree for administration.

The right of the infant, Sarah Ward, seems to me very clear. An attempt has been made to show that inasmuch as the testator was defrauded by the woman whom he believed to be his wife, and was, through that fraud, induced to believe that her child was his step-daughter, the bequest to her wholly fails. But in the case referred to of *Kennell v. Abbott*, 4 Ves. 802, Lord Alvanley took care to distinguish between the cases of an innocent and a fraudulent legatee, and in my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description. Sarah Ward, therefore, is entitled under the will, but I have some difficulty in saying that she is absolutely entitled, as there is a gift over in case she shall die under twenty-one years of age, and without issue.

Declare that the gift to Sarah Ward is valid, and the question, whether absolutely or not, will be left open until the hearing on further consideration.¹

HALL v. HALL.

COURT OF PROBATE. 1868.

[*Reported L. R. 1 P. & D. 481.*]

THIS was a testamentary suit in which the plaintiff, Ann Hall, pro-pounded the will of her deceased husband, John Hall. The defendant, William Hall, the brother of the deceased, pleaded that the will was obtained by the undue influence of the plaintiff. Issue was joined on this plea, and the cause was tried on the 6th and 7th of March, 1868, before Sir J. P. Wilde, by a special jury. The only plea being undue influence, the defendant opened the case. The deceased was a farmer and land valuer near Nottingham, and by the will in question he left the whole of his property, of the value of between £15,000 and £20,000, to his wife. The evidence called on the part of the defendant was to the effect that he had made this will solely in consequence of the violence and the threats of the plaintiff, and for the sake of peace and quietness; and that it did not express his real testamentary intentions. The evidence in support of the will was to the effect that it was the voluntary act of the deceased, and that so far from the plaintiff having used violence and threats, she had not even used persuasion to induce him to make it.

¹ See *Luttrell v. Olmuis*, cited in 11 Ves. 638, 14 Ves. 290 (*sub nom. Luttrell v. Waltham*).

Sir R. Collier, Q. C., A. Staveley Hill, Q. C., and Weightman, were for the plaintiff.

Dr. Spinks, Q. C., and Dr. Tristram, for the defendant.

SIR J. P. WILDE, in summing up, gave the following direction to the jury on the question of undue influence: To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's.

His Lordship went on to say that in this case the question was one of credibility, for, according to the evidence on the one side, the plaintiff had procured the will by violence, threats and intimidation, whilst, according to the evidence of the plaintiff and her witnesses, she had not even resorted to persuasion.

The jury found that the plea of undue influence was proved.

The court pronounced against the will and condemned the plaintiff in costs.¹

¹ "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud.

"I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your Lordships have now to deal.

"In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the

PARFITT v. LAWLESS.

COURT OF PROBATE. 1872.

[Reported L. R. 2 P. & D. 462.]

THE plaintiff, Rev. Charles Parfitt, D.D., propounded the will of Jane Conolly, of Cottles, near Bath, in the county of Wilts, widow, bearing date the 16th of July, 1862. The defendant, Philip Lawless, pleaded originally that the will was not executed in accordance with the requirements of the Statute 1 Vict. c. 26, that the deceased was not of sound mind at the time of execution, and that, as regards the residue, the will was obtained by undue influence of the plaintiff.

meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion, or fraud.

“One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it.” — *Per* LORD CRANWORTH, C., in *Boyse v. Rossborough*, 6 H. L. C. 2, 47-49 (1857).

In *In re Ruffino*, 116 Cal. 304 (1897), the court said, pp. 315-316: “The question, in the absence of fraud, always is whether the proposed will is the spontaneous act of a competent testator. If not, it makes no difference what the moral qualities of the influence may be which has overcome the will of the testator. If the importunities of a wife have destroyed the free will of a testator, the will is void. If the importunities of a mistress have not overcome the will of a testator, the will is not void, though made in favor of the mistress. Influence which has prevented an unnatural, an unjust, and a vicious will, by overcoming and controlling the testator to the extent that the will is not the spontaneous act of the testator, is unlawful — as much so as the same influence would be if exerted in the opposite direction. The question is as to the effect of the influence upon the testator's mind, not as to its moral character or its source, although in some cases the character of the person exerting the influence may be an important factor in determining its effect.” And see *Johnson's Estate*, 159 Pa. 630 (1894).

Subsequently the two first pleas were withdrawn. Mrs. Conolly's husband, who died in 1850, was possessed of a considerable estate called the Cottles estate, valued at £68,000, and other property. He left a life interest in it to his widow, and on her decease he bequeathed it to his son (by a previous wife), Charles John Thomas Conolly, absolutely; but in case his son died in the lifetime of the widow without issue, then the estate was to become hers absolutely subject to an annuity for life of £2,500 to the son's widow. Charles John Thomas Conolly died a few days before Jane Conolly, leaving a widow but no issue. The property, exclusive of the interest under her husband's will, of which the deceased died possessed was of the value of £7,000. The will propounded was divided into two parts: by the first she disposed of the property she then possessed, and gave the residue thereof to the plaintiff; and in the second she referred to her interest under her husband's will, and in case she should come into possession of the Cottles estate she charged it with annuities to the amount of £740, and subject to such charges bequeathed it to the plaintiff. The plaintiff is a priest of the Roman Catholic Church, and from the year 1848 until her death resided with the deceased and her husband as domestic chaplain; for a greater portion of the time he also acted as her confessor. The question at issue was tried before *Lord Penzance* and a special jury on the 20th and 21st December, 1871. The defendant, upon whom the burden of proof lay, produced several witnesses, but the court held he gave no evidence to go to the jury. With the leave of the court his counsel then called the plaintiff and examined and ultimately cross-examined him as a hostile witness, but the court still held that no sufficient case of undue influence to go to a jury had been offered, and directed the jury to find a verdict for the plaintiff, which they did, and probate was granted of the will on formal proof of execution. On the 24th of January, 1872, before LORD PENZANCE, MELLOR and BRETT, JJ., an application for a new trial was made on the ground of misdirection, and a rule *nisi* was ordered to issue, which came on for argument before LORD PENZANCE, FIGOTT, B., and BRETT, J.

April 24, 25. Denman, Q. C., Dr. Spinks, Q. C., and Bayford, for the plaintiff, showed cause against the rule.

Digby Seymour, Q. C., Ballantine, Serjt., and Dr. Tristram, for the defendant.

Cur. adv. vult.

July 25. LORD PENZANCE. This rule was granted in order to consider a suggestion strongly pressed that the rules adopted in the courts of equity in relation to gifts *inter vivos* ought to be applied to the making of wills. In equity, persons standing in certain relations to one another — such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward — are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is

subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. Applying this view of the subject to the making of a will, it was contended in this case that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence. It would be an answer to this argument to say that this has never been, and is not the law in this or any other court regarding wills; and that, if this court should presume to make a new law on the subject, it would establish one rule in regard to personalty, while another would remain the existing rule in regard to realty. "One point, however, is beyond dispute," said Lord Cranworth, in *Boyse v. Rossborough*, 6 H. L. C. at p. 49, "and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." But in truth the cases in equity apply to a wholly different state of things. In the first place, in those cases of gifts or contracts *inter vivos* there is a transaction in which the person benefited at least takes part, whether he unduly urges his influence or not; and in calling upon him to explain the part he took, and the circumstances that brought about the gift or obligation, the court is plainly requiring of him an explanation within his knowledge. But in the case of a legacy under a will, the legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are, therefore, set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment." *Archer v. Hudson*, 7 Beav. 551.

The law regarding wills is very different from this. The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may lawfully be exerted to

obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne and subjected to the domination of another.

The influence which will set aside a will, says Mr. Justice Williams, "must amount to force and coercion destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Williams' Executors, pt. 1, bk. 2, ch. 1, § 2. This difference, then, between the influence which is held to be undue in the case of transactions *inter vivos*, and that which is called undue in relation to a will or legacy, is all-important when a question arises of making presumptions or adjusting the burden of proof. For it may be reasonable enough to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another, by way of personal advice or persuasion, has availed himself of the natural influence which his position gave him. And in casting upon him the burden of exculpation, the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control.

For these reasons it seems to me that it would be improper and unjust to throw upon a man in the position of the plaintiff, without any proof that he had any hand whatever in the making of this will, the onus of proving negatively that he did not coerce the testatrix into devising the residue of her land to him. I say coerce, for this is the only matter involved in a plea of undue influence. Lord Cranworth appears in the case above cited to have regarded fraud as a species of undue influence. It is a mere question of terms; but by the rules of pleading established in this court since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence as a term used in a plea in this court raises the question of coercion, and that only.

I now proceed to examine the evidence, upon the assumption that the defendant was bound to prove the issue he raised, and that it was necessary for him to establish affirmatively by such evidence as the jury could reasonably act upon, that the residuary clause of this will was obtained by the coercion of the plaintiff. And upon this assumption the question is, Whether the evidence which the defendant gave ought to have been submitted to the jury? The argument on this head betrayed, I think,

some confusion as to the nature and limits of the question, whether there is in any case evidence for the jury. For instance, it was urged as each separate fact or piece of evidence came to be commented upon, that it was not for the court but the jury to assign its due value to such fact or evidence. If this were so it would be unjustifiable for the judge in any case to withdraw the evidence, however slight, or even irrelevant, from the jury. For to ascertain that it is slight or irrelevant the judge must assign a meaning and a value to it, and this might not be the same value or meaning which it would bear in the eyes of the jury. I conceive, therefore, that in judging whether there is in any case evidence for a jury, the judge must weigh the evidence given, and must assign what he conceives to be the most favorable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

Again, it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If this proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary legatee. For, upon this basis of fact, suspicion freely indulged and directed by eloquent comment might easily build up the fabric of undue influence or even fraud. It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved for the purpose of a *prima facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

I have been thus far particular in endeavoring to draw the line between that which rests upon proof, and that which rests on suspicion only, because in this case I thought the defendant's argument wholly confounded them. The propositions which he was bound to give reasonable evidence to establish were these: that the plaintiff had interfered in the making of the will, that he had procured the gift of the residue to himself, and that he had brought this about not by persuasion and advice (for that would be perfectly legal), but by some coercion or dominion exercised over the testatrix against her will or by

importunity so strong that it could not be resisted. I have looked through the evidence in vain to find reasonable proof of any one of these three propositions. As regards the making of the will the defendant took a most unusual course. For the sake of having the first and last word with the jury, he withdrew the pleas which would have put the plaintiff on proof of the will, and gave no evidence of its execution himself. The consequence was that the attorney, who received the instructions from the testatrix, who made the will, and who, it must be presumed, knew the circumstances under which it was made, and the reasons upon which the testatrix acted so far as she allowed them to be known, was not called as a witness; nor were the attesting witnesses, nor was their place supplied by any other evidence. The making of the will and everything connected with it was left an absolute blank. Literally the only proof which was offered to show that the plaintiff had anything to do with it, consisted in the fact that he was in London about the time that the will bears date, that he and the testatrix were seen together at the house of a relation of his, and that they were also seen at the exhibition. Whether the plaintiff knew what the testatrix had done for him in the will, is a point to which much cross-examination and much argument was directed. He denied it, but admitted many things from which a doubt of his denial may be inferred. But in my mind this matter is immaterial. The fact of his knowing the contents of the will after it was made is some proof that he was in the testatrix's confidence, but it has no tendency, as it seems to me, to support the conclusion that he had himself interfered in the making of it.

It is at this point of proving the plaintiff's interference that the evidence wholly fails. But that I may not do the defendant any injustice, I will recapitulate the whole of what was proved on this head. The plaintiff was the confessor of the testatrix. He knew, from what she told him, that she probably had power over the disposition of the estate in case of her stepson's death before her, and advised her to consult a lawyer. She asked for the name of the Roman Catholic bishop's attorney, and he told her. This attorney was the person who afterwards in London made the will. She told the plaintiff at some time that she had made him her executor, and had given him full powers. He remonstrated against his being her sole executor, to which she replied, "You villain! whom else have I to trust?" The plaintiff admitted that he had heard that Mr. Cooper, also a Roman Catholic priest, was originally intended to be executor and residuary legatee, but that he (the plaintiff) had been put in his place. The testatrix mentioned to the plaintiff from time to time legacies that she wished paid, and the plaintiff made entry of them on a piece of paper in Greek characters, that they might not be read by any one about the house. Those legacies were not inserted in the will of 1868, which was made after two of them at least had been thus noted by the plaintiff. There is not a single fact in this enumeration, as it seems to me, which is not quite as consistent with the testatrix having told the plaintiff what she had

done, after she had done it, as with the plaintiff having had any hand in doing it; and it would, I think, defy ingenuity to demonstrate that from any one of these facts a reasonable or logical conclusion could be drawn that the plaintiff had a hand in making the will.

But if the evidence fails thus signally to establish the first proposition, with what pretence of reason can it be held to support this much larger proposition, namely, that the plaintiff not only advised the residue to be left to himself, but forced this disposition upon the unwilling testatrix? And yet that is what the defendant has undertaken to prove. No amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, would avail, according to the existing law, to set aside this will, so long as the free volition of the testatrix to accept or reject that advice was not invaded. And what, it must therefore be asked, is the proof that any attempt ever was made to control her free will? There was not a fact, a word, or an event proved which showed that on any occasion the testatrix had subordinated her own will to that of the plaintiff. It was stated, indeed, that he managed her affairs for her; but even this was confined to the last three years of her life, many years after the date of the will, and at a time when her health had failed. But of evidence to show that, in the common affairs of life, or in business, or anything else, she was under the plaintiff's dominion, there was an absolute and total dearth. The only fact that pointed to her having been ever controlled by anybody in anything, was this that when asked by Miss O'Rourke why she did not tell Mr. De Ruffière that she had power to devise the estate, she replied, "They won't let me." At this time she had consulted her attorney, Mr. English, and perhaps Mr. Ward, and she had been in communication also with her stepson, Mr. Conolly, for he spoke of what he expected she would do with the property; and for aught that is known she had consulted other persons; and yet these words, "They won't let me," were argued to establish the following chain of reasoning. Some one had told her not to tell Mr. De Ruffière; therefore the plaintiff was the person who had done so. She wished to tell Mr. De Ruffière; therefore the person who gave the advice controlled her. If he controlled her in this, he must have controlled her in all other things; therefore he controlled her in making a will; therefore he controlled her in leaving the residue to himself. Unless this reasoning is satisfactory, there is not only no evidence of this control, upon which everything turns, but there was hardly an attempt to establish it. The plaintiff had lived in the house with the testatrix for years, and any control of his over her, if it existed, must have been visible to servants or some of the numerous friends who visited at the house. The defendant himself and his wife were called as witnesses, and had been frequently visiting at the house; and yet no question was asked them on the subject. Miss Martin, a friend and visitor, was also called, but not a question was asked her upon it. The only other witness was Miss O'Rourke. She had lived a year with the testatrix in 1856. visited her again for weeks in 1860, again in 1862,

and again in 1866; and even of her no questions were asked by the defendant's counsel as to any dominion exercised in anything, however serious or however trivial, by the plaintiff. But she was cross-examined upon it, and then she said the testatrix was a clever person, who had a pretty firm will of her own, and that she never saw anything which led her to believe that the plaintiff ever induced her to do anything which she did not wish to do of her own accord. No other visitor, friend, or servant was produced, and the case was actually closed without a question being put by the defendant's counsel to any witness as to the existence of a dominating influence on the part of the plaintiff over the testatrix, either in relation to her testamentary dispositions or anything else. Then in the last resort the defendant called the plaintiff himself, and was allowed to cross-examine him; and, strange as it may appear, no instances or occasions were put to the plaintiff on which he was alleged to have controlled the testatrix, and he was allowed to leave the witness-box without being challenged to admit any facts from which the habitual exercise of dominion might be inferred. Unless, therefore, it is just and right to conclude in all cases that a Roman Catholic priest, holding the position of confessor, must be held to possess and exert over those whom he confesses such a dominion as to extinguish their free will in the disposition of their property, there were no materials, in my opinion, from which such a conclusion could be drawn in the present case, and therefore no evidence for the jury.

There remains one fact to be noticed. The testatrix is proved to have told her niece, Miss O'Rourke, that if she wished to leave money for the saying of masses, or other purposes of religion, she must not express her trusts in her will, but leave the money to her confessor, and tell him privately what she wished. This statement greatly strengthens the suspicion to which the general facts of the case are calculated to give rise, that this devise of the residue to the plaintiff was in reality accompanied by some secret trust for religious purposes. Whether there be such a trust in this case it is not for this court to investigate. Whether the possibility of such trusts existing, and eluding the power of courts of justice to drag them to light, ought or ought not to induce the legislature to place any new restraints upon bequests or devises for ministers of religion, it is not for this court to suggest, still less to assert. But one thing is plain; if this testatrix really did intend her property to be applied for the saying of masses, or for charities or other religious objects, and confided in her confessor to see that her objects were attained, she was, in the making of this will, carrying out her own wishes; she was intent on achieving an end of her own for the ease of her own mind, and was obeying the impulses of her own religious faith, all of which is hardly consistent with the notion of her having acted under the dictation of another.

The rule will be discharged with costs.

(His Lordship further stated that MR. JUSTICE BRETT concurred in this judgment entirely, both in reference to the law and as to the facts,

and that Mr. BARON PIGOTT also concurred, but with hesitation. He regarded the whole case as full of suspicion and mystery. His doubts arose only as to the effect of the evidence, and he quite agreed in the directions it contains on the point of law.)

*Rule discharged.*¹

WINGROVE v. WINGROVE.

PROBATE DIVISION. 1885.

[Reported 11 P. D. 81.]

THE plaintiff as a legatee propounded a will dated the 15th of September, 1869, of Elizabeth Wingrove, late of 87 Long Lane, West Smithfield, and alleged that a codicil dated the 9th of October, 1880, which revoked some of the gifts to him, was procured by the undue influence of the defendants. The defendants in the statement of defence denied that the codicil was procured by undue influence, and claimed probate of it together with the will. The action had been tried by a common jury, who found a verdict for the plaintiff, which was subsequently set aside and a new trial ordered by a special jury.

Murphy, Q. C., and *Gye*, appeared for the plaintiff, and

Inderwick, Q. C., and *Pritchard*, for the defendants, in the second trial.

The burden of proving the undue influence being upon the plaintiff, his counsel opened the case.

SIR JAMES HANNEN (President), in addressing the jury said: Gentlemen of the jury, I must ask your particular attention to the exposition which I am about to give you of the law upon this subject of undue influence, for I find, from now a long experience in this court, that there is no subject upon which there is a greater misapprehension.

The misapprehension to which I have referred arises from the particular form of the expression. We are all familiar with the use of the word "influence;" we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make

¹ See *Wright v. Howe*, 7 Jones, 412 (N. C. 1860); *St. Leger's Appeal*, 34 Conn. 434 (1867); *Tyson v. Tyson*, 37 Md. 567 (1872); *Goodbar v. Lidikey*, 136 Ind. 1 (1893); *Denning v. Butcher*, 91 Iowa, 425 (1894).

Some American courts hold that the doctrine of equity as to gifts *inter vivos* should be applied to wills. *Morris v. Stokes*, 21 Ga. 552, 575 (1857); *Meek v. Perry*, 36 Miss. 190, 252 (1858); *Hegney v. Head*, 126 Mo. 619 (1895). See also *Marx v. McGlynn*, 88 N. Y. 357, 371 (1882); *Bancroft v. Otis*, 91 Ala. 279 (1890); *Coghill v. Kennedy*, 119 Ala. 641, 658 (1898).

a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favor. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favor, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it."

If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn the testator for having such a wish, though you may condemn any person who has endeavored to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence.

There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.

DOWNEY v. MURPHY.

SUPREME COURT OF NORTH CAROLINA. 1834.

[Reported 1 Dev. & B. 82.]

THIS was an issue of *Devisavit vel non* as to a script produced by the plaintiff as the will of John G. Smith.¹

On the trial before *Norwood, J.*, at Granville, on the last Spring Circuit, the plaintiff having made out a *prima facie* case, by proof of the formal execution of the supposed will, for the defendants, the caveators, it was objected, that the deceased, at its execution, was not of perfect memory, and if he had been, that he was at its execution weak in body and mind, and *in extremis*, and that the execution by the supposed testator was, under these circumstances, procured by the fraudulent practices of the plaintiff, who was the executor, and took a large beneficial interest under the supposed will.

Upon the issue much testimony was offered by both parties. It was alleged by the defendants, that the supposed will never had been read over to or by the testator; to establish the contrary, the plaintiff, among other things, endeavored to prove, that an interlineation near the end of the paper, was in the handwriting of the deceased. The deceased, when in health, was a man of a clear head, an acute intellect, and of decided business habits; but at the time of the execution of the will was laboring under a lingering disease, which had prostrated his physical powers, and had affected his understanding, as was contended by the defendants.

It was admitted that the will was in the handwriting of the plaintiff, who was a favorite nephew and confidential agent of the deceased; but it was contended that it was written from instructions given by the deceased.

His Honor, in his charge to the jury, informed them, that in order to the validity of a will, the testator must have a sound and disposing mind and memory; but that though his mind might be weakened or impaired from age and bodily infirmity, still if he retained intellect enough to make a rational disposition of his estate, it was sufficient: that as with a deed, so with a will, in general, if executed by the party, it was sufficient, though not read over, or the contents thereof shown to be known to him — the act of execution recognizing and adopting the instrument. But that there might be circumstances which would require a different rule; that a will being written by a legatee, was looked upon as a suspicious circumstance, the suspicion being greater or less according as the interest was greater or smaller; and that where a will was written by one taking a large and beneficial interest under it, for a testator, in his last illness, and under great

¹ Part of the case is omitted.

weakness from disease, and the writer was a confidential agent and adviser of the testator, it was necessary, in support of the will, to produce some evidence to show a knowledge by the testator of its contents, as that it was read to him or by him; or if not so read, proof that it was written from instructions by the testator, and according to them, would be sufficient, as showing that he knew the contents; that for this purpose the testimony as to the interlineation being in the handwriting of the deceased was submitted to them, and if in his handwriting, it would be important evidence; the evidence and the inference to be drawn from it, was for them.

A verdict was returned for the caveators, and the plaintiff appealed.

Iredell and *Devereux*, for the will.

Nash and *Badger*, contra.

RUFFIN, C. J. [considered the questions of evidence, the statement of which has been omitted, and then continued thus:] Having considered these points, that which arises upon the instructions to the jury is next presented. It is one of much importance, both in its bearing upon the interests of these parties, and as a general question of law. His Honor first stated to the jury, as we conceive, correctly, that to the validity of a will a disposing capacity was necessary, and a knowledge of the contents of the instrument; and that in point of law, such a knowledge was presumed from the fact of execution, if the capacity was satisfactorily established. But he further stated, there were cases which required a different rule; and, applying the exception to the case before him, he proceeded to lay down these principles to the jury: That a will being written by a legatee was in law a suspicious circumstance; the suspicion being greater or less in proportion to the interest; that when a will was written, by one taking a large and beneficial interest, for a testator in his last illness, and great weakness from disease, and the writer was a confidential agent and adviser of the supposed testator, it was necessary in support of the will, to produce some evidence to show a knowledge by the testator of the contents of the will, as that it was read to him, or by him, or, if not so read, that it was written from instructions and according to them, which would be sufficient.

The instructions assume that in point of law, the validity of the will depends upon such proof; and that in such a case, the inquiry is not one of fact, whether the maker of the instrument actually knew, or was actually ignorant of the contents of the paper; but is an inference of law, either that he did not know them, or that it does not appear, and it ought to appear, by plain proof, that he did know them. The correctness of the instructions depends therefore upon the inquiry, whether by the laws of this State, these are inferences of fact to be drawn by the jury, or are to be stated by the court as fixed legal principles.

In support of the opinion of the court, many cases have been read from the ecclesiastical courts of England; in which the rules laid down

to the jury are stated as *rules* or *principles*, which govern those courts. But those cases and the terms in which the judges deliver themselves, are far from satisfying us, that the nature of the inquiry makes it, in a court of common law, the province of the judge and not the jury to determine it. The Court of Probate in England decides every question both of law and fact, which the case presents; the capacity of the testator, in all its various gradations as perfect, doubtful and defective. Where of the last kind, the instrument is necessarily inoperative under all circumstances. But where a testable capacity is found, the degree of proof that the instrument was freely executed, and that its provisions were really assented to by the maker, must necessarily vary with the degree of capacity, in order to satisfy a rational mind, that there was such free agency, knowledge and assent as the law demands. That tribunals such as the ecclesiastical courts, constituted of a single judge, holding the court permanently, and deciding the whole case, should, in the course of repeated discussions of evidence of a similar kind, adopt, for the ease of the court, and for the information of suitors, some propositions, as the measure of that proof, to be deemed sufficient or insufficient under particular circumstances, is not surprising. To the usefulness of such a court, such rules, as *principles* for the government of the judge, are indispensable. They are requisite, both to relieve the judge from unnecessary *labor*, and to exclude the suspicion and the danger of unlimited and irresponsible discretion upon all questions of fact; which in a permanent magistrate is intolerable. Hence, in the very able opinions which have been delivered by the judges of those courts, are constantly found expositions of the reasons on which the credit to be given to the witnesses ought to rest, and on which inferences of particular facts may be rationally drawn from certain evidence; and such reasons, and the determination to which they led in one case, are naturally appealed to by counsel, and acknowledged by the court in succeeding cases. At first they may be respected only as the conclusions of an able, well-instructed and experienced mind, well calculated to influence another mind to adopt the same conclusions. But they soon acquire the authority which a succeeding judge is neither able nor willing to deny to them, of being *precedents*. For, as has been forcibly remarked, it is the professional tendency to repose on precedents; and it is fortunate for the institutions of every country, that there is such a tendency.

That the principles upon which the Ordinary in England requires particular proof, to rebut the presumption of fraud in obtaining a will from a man of weak or impaired faculties, are obligatory upon each succeeding judge who may sit in those courts, seems to be a settled point in those courts. Nor can it be denied that those principles have been most carefully considered and cautiously settled. They address themselves forcibly to every rational mind; and were most properly urged against the instrument offered for probate in this case. The court is not to be understood as pronouncing them insufficient to repel

all the presumptions drawn from the execution of the instrument by a testator in the condition of mind and body imputed to Mr. Smith by the witnesses. Upon its sufficiency or insufficiency this court would carefully abstain from intimating any opinion; and allusion is made to it, only to prevent the supposition, that our decision rests on a difference of opinion between us and His Honor upon the weight to which the evidence was entitled. On the contrary, we think the question is, whether either court can determine its weight; in other words, whether the inquiry be one of fact or law. That question cannot be determined by the decisions of the ecclesiastical courts, for whether the nature of the inquiry be of the one kind or of the other, the remarks, rules, principles, by which one great judge was guided in the discussion, weighing and deciding on evidence of a particular character, in a particular case, would be authoritative on another upon the like evidence in a like case. The question depends upon the nature of the inquiry according to the common law of England, and the Statute laws of this State. For although the question is one of probate, and therefore might appropriately be governed by that portion of the ecclesiastical law which is incorporated into the common law and administered in peculiar jurisdictions; yet it has seemed good to the legislature to refer it to a tribunal of a different nature, a jury. That tribunal is the favorite of the common law as the arbiter of facts; and not less so with the legislature of this State than with our ancestors. For not only is the decision of all facts within the power of a jury, but in this State it is exclusively their province to decide them, uninfluenced by the opinion of the judge upon the weight of the evidence, or its sufficiency to prove any fact in dispute. To the jury any argument may be urged impugning, or enforcing deductions of one fact from another proved, or from the defect of full proof of either the one fact or the other; and the opinions of men of able and practised minds may properly be laid before them in argument, as likely to influence their judgment by the force of the reasoning which led to those opinions, or by the authority of the opinions themselves, coming from such sources. But it is impossible to say, that such a tribunal is bound as to a conclusion of fact, by the precedent set by another tribunal for the decision of facts, whether consisting of a single judge, or of the numerous judges who compose a jury. There is no *law* to such a body but its conclusions upon the evidence as to the fact sought.

Is there a principle to be found laid down anywhere in the common law, as a positive precept, that *it is necessary* to the validity of the will of a man, written in his last illness, and when very weak from disease, by one who takes a large legacy under it, and was the confidential friend and adviser of the alleged testator, that those who offer the will should distinctly prove, besides the testable capacity of the maker, and the due formal execution of the instrument, the further facts, by distinct evidence, that the maker knew and approved of the contents of the instrument? If there be such a proposition, it has escaped our researches

among the treasures of the common law. It is the principle of that code, that a paper obtained by duress or undue influence, or by deception, and without the free consent of the maker, given upon a knowledge of its provisions, is not a will. But that the want of such knowledge and consent are legal conclusions from evidence that the supposed testator was worn down by disease, and that the writer of the paper derives a large benefit under it, is nowhere found; nor that the like conclusion is absolutely to be drawn from those facts, with the additional one, that the writer was or was not a stranger or a confidential friend of the testator. After proof of capacity and execution, the common law lays down no rule upon the subject; but submits the general question to the jury for a decision, according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper, and assent thereto — under the comprehensive inquiry, whether a fraud has been practised. Where the testator's situation is such as to render the perpetration of a fraud easily practicable, the jury may say, they are not satisfied one was not practised, and thence infer its existence, unless the contrary be clearly shown. It is in the power of the jury, and may, as reasonable men, be their duty, for fear of fraudulent practices, and in prevention of them, to find a fraud, or to give a verdict such as they would if they had found a fraud, where there is a defect of proof to negative it. It is upon that principle, that ecclesiastical judges regulate their judgments, as we understand them. But those are conclusions of fact, arising from evidence given or withheld. A *defect of proof*, unless it be a *total* defect, is for the consideration of the jury, wherever the law requires the intervention of a jury. The ecclesiastical judge can say, a case is not established, because it is reasonable to require in the particular case full proof, and to such and such points the proof is not full. So may a jury. But a judge, under our system of jurisprudence, cannot determine, when *prima facie* proof is offered, that the case fails, because further proof is not given. That the will was written by a legatee — that he stood in the relation of kindred, friend, or agent to the party, do not, of themselves, prove that the testator did not know or assent to the dispositions. They raise a suspicion of imposition, and make it reasonable to call for explanations. Such explanations may be given, as acknowledged in these very instructions, by evidence of the actual reading of the will by or to the testator, or by proving its conformity to the instructions given for it. There are other circumstances equally satisfactory; such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be prompted by natural affection to make. The intimacy of the relation between the writer and the testator may be, and is even less suspicious, than if they were strangers; upon the supposition that each draftsman writes himself heir. These considerations must satisfy the mind, that upon such a subject, the law cannot lay down as a test, that a will is, or is not, valid, when executed under any one or more of the particular

circumstances mentioned ; but necessarily refers the facts upon which its validity legally depends, to the decision of the jury, under evidence as to all the circumstances attending its preparation or execution, the condition, mental and physical, of the testator, the contents of the instrument, and the benefits provided in it for those actively concerned either in the preparation or execution. Evidence to each of these points may have an important bearing upon the just conclusions to be formed of the testator's capacity, and of the advantages that may have been taken of his weakness or confidence ; and a jury may justly be alarmed at the danger of exposing testators to importunities and imposition, which would follow from establishing papers to be wills, when obtained *in extremis*, and under suspicious circumstances, unless those suspicions be removed by affirmative and plenary evidence, that the testator comprehended the dispositions made for him, and fully and freely sanctioned them. But like other questions of actual intention ; of the state of the mind ; of influence ; knowledge or ignorance of one person, and of integrity or dishonesty and fraud of another ; this question is one of fact, to be decided by the jury upon evidence ; which, in the opinion of the judge, is competent, as tending to establish any of those facts. Its tendency, it is the province of the judge to explain, by stating what conclusions may be drawn from it ; but whether it establishes a fact, or whether a conclusion deducible from it, is or is not rebutted by other evidence, is the province of the jury to say.

That the rules of the ecclesiastical courts, although most sensible deductions of facts, are not parts of the law of this country, but only of the law of those courts, we deduce, not only from the manner in which the judges in those tribunals speak upon this question, but from the nature of the subject itself. But furthermore, the questions which arise before the ecclesiastical courts upon the probate of testaments, arise also in the courts of common law, in ejectments on devises, or on issues out of chancery, to try the validity of the will. Yet none of the principles on which the Ordinary makes deductions from evidence given or withheld, have been incorporated into the common law, so as to be laid down to the jury, as conclusions drawn from them. The evidence is submitted to them, that they may draw their own conclusion. For this very reason, the chancellor will not determine the validity of the will, but always sends it to an issue, *devisavit vel non* ; and upon that issue and in ejectment, the verdict is frequently at variance with the judgment of the ecclesiastical judge on the same instrument, offered in his court as a testament.

For these reasons, we think there was error in stating it as a proposition of law, that the evidence supposed was necessary to the validity of the paper as a will. It should have been left to the jury to say, whether they thought, from the evidence given, that the presumption from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed ;

by its contents, and by the circumstances relied on by the defendant; or was confirmed by its contents and by the evidence to the testator's knowledge of them, and other circumstances offered on the other side. The case must therefore be submitted again to the jury.

Per curiam.

*Judgment reversed.*¹

B. Mistake.

ANONYMOUS.

COMMON PLEAS. 1587.

[*Reported Godb. 131, pl. 149.*]

It was holden by Anderson, C. J., that if one deviseth lands to the heirs of I. S. and the clerk writes it to I. S. and his heirs, that the same may be holpen by averment, because the intent of the devisor is written, and more; and it shall be nought for that which is against his intent, and against his will, and good for the residue. But if a devise be to I. S. and his heirs, and it is written but to the heirs of I. S. there an averment shall not make it good to I. S. because it is not in writing, which the Statute requires; and so an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.

BROWN v. SELWIN.

CHANCERY. 1734.

[*Reported Cas. temp. Talb. 240.*]

JOHN BROWN, on the 23d of June, 1732, made his will, and thereby bequeathed to the plaintiff a legacy of £500 and all his plate; to the defendant he gave all his leasehold messuages; and after several other legacies and bequests, as well as devising some freehold and copyhold lands, he devised as follows: "and as for the rest, residue and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways entitled to, which I have not herein and hereby devised, given, &c., I give and bequeath the same,

¹ See *Barry v. Butlin*, 2 Moore P. C. 480 (1888); *Durling v. Loveland*, 2 Curt. 225 (1889); *Cramer v. Crumbaugh*, 3 Md. 491 (1863); *Post v. Mason*, 91 N. Y. 539 (1883); *Stirling v. Stirling*, 64 Md. 133 (1885); *Patten v. Cilley*, 67 N. H. 520 (1893).

But in *Hughes v. Meredith*, 24 Ga. 325 (1868), it was said that when the scrivener, not being of kin to the testator, takes a large interest under the will, the presumption of law is that the testator does not know the contents of the will. See, however, *Carter v. Dixon*, 69 Ga. 82 (1882); *Woodson v. Holmes*, 117 Ga. 19 (1902). Cf. *Yardley v. Cuthbertson*, 108 Pa. 395 (1885); *Blume v. Hartman*, 115 Pa. 32 (1887); and earlier Pennsylvania decisions referred to in those cases.

and every part thereof, and all my right, title and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators and assigns, as tenants in common, and not as joint tenants;" and afterwards appointed the plaintiff and defendant his executors, and soon after died; and the plaintiff and defendant proved the will. The defendant was at the time of the testator's death indebted to the testator in £3000 principal money, besides interest, and for securing thereof had given a bond to the testator, dated the 20th of June, 1732, in £6000 penalty; the bill was brought that the defendant might account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said £3000 and interest; and the cross bill was to have the bond delivered to be cancelled.

It appeared by the answer of the defendant in the original cause, and by the proofs in both causes, that the testator designed to give this money to the defendant; and gave one Viner, the attorney concerned in drawing the will, instructions in writing accordingly; but Viner refused to make mention of it in the will, insisting that the bond would be extinguished and released of course by Mr. Selwin's being appointed executor; but the testator appearing dissatisfied with Viner's opinion, a case was stated for counsel's opinion, who confirmed what Viner said: in confidence of which the testator signed and published his will, with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

LORD CHANCELLOR. [LORD TALBOT.] The question is, whether £2000 which was due to the testator from Mr. Selwin, shall pass to Mr. Selwin by his being made executor; or, whether it passed by the devise of the residue to the two executors. The written instructions for drawing the will directs the £3000 all to Mr. Selwin. The attorney who was to draw the will says it was the testator's intention it should go so; but that he, apprehending that making the obligor executor was an extinguishment of the debt, hindered it from being particularly mentioned. It was never doubted but a debt due from an executor to a testator shall be assets in the executor's hands to pay debts; for, if the testator had expressly given it away, even that could not have screened it from debts: so the testator may give a legacy out of a debt due to him, as in the case in Yelv. 160, *Flud v. Rumsey*, which authority is right; the implied gift, by making the debtor executor, may be controlled by an express gift, or by a devise of all his debts.

It hath been questioned whether such a debt be assets to pay legacies in general; but that not being the present case, it is not necessary to be determined: I am at present inclined to think it may; but shall not bind myself by giving my opinion till the case happens. If this be considered upon the will, without the parol evidence, it will appear clearly from the general words of devising the residue, *i. e.*, *all his real*

and personal estate which he had not thereby before given to the residuary legatees; that this debt, which at that time was part of the personal estate, falls within the description: the testator was entitled to this debt when he made his will, and at the time of his death; he had not before disposed of it, nor had he appointed Mr. Selwin executor. A devise of the residue after payment of debts and legacies plainly comprehends this debt; and the only doubt is with regard to Mr. Viner's evidence, who wrote the will. I privately think that it was intended the £3000 should go to Mr. Selwin. Privately I think so; but I am not at liberty, by private opinion, to make a construction against the plain words of a will. None of the cases where parol evidence has been admitted have gone so far as the present case; the farthest they go is to rebut an equity or resulting trust; the parol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will, as in the present case. It is better to suffer a particular mischief than a general inconvenience, and so reversed the decree, and ordered Mr. Selwin to account with the plaintiff Brown for the said £3000, but no costs.

This was upon an appeal from the Rolls.

This cause, the 26th of March, 1735, came before the House of Lords upon an appeal, and the Lord Chancellor's decree was affirmed: and the Lords would not allow the parol evidence to be read, nor even the respondent's answer as to these matters.

BLACKWOOD v. DAMER.

COURT OF DELEGATES. 1783.

[*Reported 3 Phillim. 458, n.*]

M. JANSSEN wrote with his own hand instructions for a will, in which he left the residuum to his youngest daughter, since married to the Honorable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days; the will was executed in due form—contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission: the other variations he supposed he had received verbal instructions to make.

The court below had pronounced for the instructions as part of the will.

The delegates decreed that the residuary clause should stand as part of the will, but no other part of the instructions.

DELEGATES, *Mr. Justice Willes, Mr. Baron Eyre, Mr. Justice Nares, and Dr. Macham.*¹

¹ *Castell v. Tagg*, 1 Curt. 298 (1836), *accord.* See *Fawcett v. Jones*, 3 Phillim. 484, 485-487 (1810).

NEWBURGH v. NEWBURGH.

CHANCERY. 1820.

[Reported 5 Mad. 364.]

THE late Earl of Newburgh, having estates in the counties of Sussex, Gloucester, and elsewhere, gave instructions to his solicitor to prepare a will, which *inter alia* was to give to his wife, the Countess Dowager of Newburgh, an estate for life in his estates in the counties of Sussex and Gloucester. The solicitor prepared a will in writing accordingly, and the same was afterwards laid before an eminent conveyancer to settle. By some accident, the word "Gloucester" was struck out by the conveyancer, and the person who made the fair copy of the will, changed the word "counties" into "county," and the will, as fairly copied, omitted therefore altogether the estate for life to the Countess Dowager, in the county of Gloucester.

At the time Lord Newburgh executed the will, the solicitor who attended the execution had with him the abstract of the will as originally prepared, and the will was not itself read, but this abstract, which represented that a life estate was given to Lady Newburgh, as well in Gloucester as in Sussex; and Lord Newburgh executed the will, believing that it followed the abstract.

The first bill was filed for the execution of the trusts of the will as they actually appeared upon the face of the will. The second bill was by the Countess Dowager of Newburgh, stating the omission of her life estate in Gloucester, and praying that the mistake in that respect might be rectified, and that the trusts of the will might be executed with such correction.

The first question was, whether the evidence on the part of the Countess Dowager of Newburgh could be received for the purpose of correcting the mistake?

THE VICE-CHANCELLOR [SIR JOHN LEACH] refused the evidence; because, admitting it to be clearly made out that the mistake existed, this court had no authority to correct the will according to the intention. The will executed with that omission was certainly not the will of the deviser, and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the court could not for that reason set up the intention of the testator, which, by mistake, he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a deviser failed to comply with the Statute by mistake or accident, and to operate this repeal, by admitting parol evidence of the intention of the deviser, which it was the very object of the Statute to avoid. — That this case bore no analogy to cases where the devisee or heir prevented another gift in the will, by undertaking to perform it. There, the Statute was in no manner broken in upon; but this court,

in respect of the fraud attempted, fastened that trust upon the estate which in equity and conscience attached upon it. — That admitting that voluntary conveyances might be corrected upon the principle, that as between volunteers this court would not permit a claim proceeding upon mistake, as to which two cases were cited; yet this principle had no application to the case of wills, for the difficulty was not that the will was a voluntary instrument, but that there could be no will without the forms of the Statute of Frauds, and the disappointed intention had not those forms. That if any party asked the same, he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. No such issue was asked; and the case was sent, as to several questions of legal construction, to the Court of King's Bench.

The heir here contended that the omission of Lady N.'s life estate had made the subsequent limitations void as too remote; and it was immaterial to him, if he was right in this point, to try the fact of *deviavit vel non* as to the Gloucester estate. If otherwise, he would have avoided the will as to this estate upon the fact; because a gift immediate is not an execution of the intention to give after a prior life estate, and the omission of the life estate of Lady N. must therefore have defeated the whole devise as to the Gloucester estate.

I was not present at the argument of the foregoing points, but am informed that, as to this last point, *Mr. Bell* cited a case, not in print, upon the authority of Lord Chief Baron Richards, in which it was considered that Lord Eldon had sent it to a jury to try upon the same description of facts, what was the will of the testator; but whether any such trial had ever taken place was not known.

Mr. Sugden cited *Towers v. Moor*, 2 Vernon, 98, in which the same doctrine had been held, as to the Statute of Frauds, as was expressed by the Vice-Chancellor.

The case was afterwards re-heard before the Vice-Chancellor, and it was then suggested, as the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had first written, and afterwards struck through with a pen, but had been copied by mistake in the fair will; and it was contended there ought, therefore, to be an issue to try whether those words, so introduced by mistake, were part of the will.

The VICE-CHANCELLOR thought that if such a case had been originally made, they would have been entitled to such an issue; but that such case being in direct opposition to the allegations upon the record, he could not entertain it.¹

¹ "In *Newburgh v. Newburgh*, the conveyancer, in settling the will of Lord Newburgh, had struck out by mistake the word 'Gloucester,' in a devise to the wife of the

MITCHELL v. GARD.

COURT OF PROBATE. 1862.

[Reported 3 Sw. & Tr. 75.]

SIR C. CRESSWELL gave the following judgment:¹ In this case the defendants propounded a will alleged to have been made by Mary Gregory, widow. The plaintiffs pleaded—first, that the will was not duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; thirdly, that the paper-writing propounded was not the will of the deceased; fourthly, that the will was obtained by the undue influence of the defendant Gard.

Issues were joined on these pleas, and the cause came on for trial at the last assizes for Exeter, before *Byles*, J., when the jury found,

testator's estates in the counties of Sussex and Gloucester, and the word 'counties' was then altered by the copying clerk into 'county'; it was held both by Leach, V. C., and Lord Eldon, C., that parol evidence was inadmissible to prove the mistake. Upon an appeal to the House of Lords the judges were unanimous that the parol evidence could not be received, but the case was ultimately decided by the House upon the true construction of what still appeared on the face of the will. Upon the question of parol evidence I cited for the respondent *Towers v. Moor*, 2 Vern. 98; *Seymour v. Rapier*, Bunb. 28; *Lord Walpole v. Lord Orford*, 3 Ves. 402; 7 T. Rep. 138; *Kelly v. Powlett*, Ambl. 605, 1 Bro. C. C. 476; *Doe v. Bland*, 11 East, 441; *Harwood v. Wallis*, 2 Ves. 195; *Fonnereau v. Poyntz*, 1 Bro. C. C. 477; *Brown v. Selwin*, For. 240; *Stratton v. Best*, 1 Ves. Jun. 285.

"The Vice-Chancellor appears to have thought that the omission of the word 'Gloucester' in the particular devise would avoid the whole will as to Gloucester, although in other passages in the will the estates were regularly devised according to the testator's intention, for although he held that he could not supply the word omitted, yet he said that the will executed with that omission was certainly not the will of the devisor, and so it must be found by a jury upon the facts stated as to the Gloucester estate. He added, that if any party asked the same he was ready to direct an issue to try whether this was the will of the testator as to the Gloucester estate, and upon this issue the evidence tendered would be admissible. This the heir at law declined, because upon the will as it stood, *prima facie* the Gloucester estate was omitted in the devise to Lady Newburgh for life, with many remainders over, including limitations to unborn children in strict settlement, and it was not until failure of all these limitations that there was in express words a devise over of the Gloucester with the other estates, so that the devise over appeared to be too remote and therefore void. Of course Lady Newburgh sought no such issue, because she wanted an actual devise to her to support her claim. But the Vice-Chancellor in offering such an issue must have been of opinion that the omission of the word 'Gloucester' in the particular devise would render the whole will void as to the Gloucester estate. This, of course, could not be maintained, because, although the will did not contain all that the testator intended as to this estate, it contained in the actual devises of it nothing but what he did intend. And in the result the omission was supplied by construction, and the will was supported just as if there had been no mistake."—*Sugd., Law of Prop.* 206, 207.

"In the course of the argument in the House of Lords of the case of *Newburgh v.*

¹ The opinion only is here given.

first, that the will was duly executed; secondly, that the deceased was not of sound mind, memory, and understanding; fourthly, that the will was not obtained by undue influence.

With regard to the third issue, the learned judge put certain questions to the jury suggested by the evidence, which, as far as that issue was affected, was as follows: The testatrix, on Tuesday, the 16th of September, in the morning, gave to the defendant Gard instructions for her will. She named several persons who were to be legatees, and the sums to be given to them respectively, and she made Gard residuary legatee. Gard directed his son, who was in practice as an attorney, to prepare a will according to those instructions, and to do it quickly. The son, in his haste, omitted the name of Triplett as one of the legatees. In the afternoon, Gard, the residuary legatee, took the will to the house of the deceased, and was soon afterwards followed by two medical men. One or more of the legatees named in the will were there, and some conversation took place about two or three other persons, and deceased said that she wished them to have a legacy of £5 each. Gard made a memorandum of this, and said it should be attended to; but the will was not altered. Soon after this all persons, except the two Gards (father and son) and the medical men, left the room. Gard then read over the will slowly and carefully to the deceased; she attended to it, and expressed herself satisfied. Neither she nor Gard noticed the omission of Triplett's name. The will was then duly executed by her, and attested by the medical men. The learned judge told the jury that an accidental and innocent deviation from instructions (as

Newburgh, Mr. Heald, for the appellant, was asked by Lord Eldon, C., whether there was any case in which an addition had been made to a will. *Hippisley v. Horner* was quoted. The Lord Chancellor said, 'I have known cases in which matter has been struck out of a will improperly inserted in it. If you insert a clause in a will, how are you after his death to have that attested by three witnesses?' Mr. Heald observed that the House would only be required to strike out a clause. Lord Chancellor: 'The cases I allude to were all cases in which it was struck out on the ground of fraud.' In a further part of the argument the Lord Chancellor asked, 'Are you to direct the judge what evidence he is to receive? *Hippisley v. Horner* is not worth twopence' (this expression I wrote down at the time it was uttered).

"In the above case of *Newburgh v. Newburgh*, Lady Newburgh's cross bill was filed in order to have the word 'Gloucester' supplied, by parol evidence of the mistake. That having failed in the court below, the counsel then discovered that by the omission altogether of two lines introduced by Mr. Butler (which were intended to contain an enumeration of all the estates in the term of 2,000 years, but which omitted 'Gloucester,') the will would convey all the estates to Lady Newburgh, according to the intention. But the Vice-Chancellor held that the frame of the bill was in direct opposition to that view of the case. If this view had originally occurred to Lady Newburgh's counsel, and the bill had been adapted to it, evidence would have been tendered to establish the mistake. But this is a dangerous jurisdiction: for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, although inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation, made through carelessness or ignorance, could be corrected by striking out the words improperly introduced." — *Id.*, 196, 197.

See *Miller v. Travers*, 8 Bing. 244, 254, 255 (1832).

in the case of the legacy to Triplett) would not vitiate a will afterwards executed and rightly understood, or even executed by a competent testator; but, with reference to the omission of the other legacies, he asked the jury whether the instructions for them were present to Gard's mind at the time of the execution of the will, but absent from the mind of the testatrix, and he (Gard) knew them to be so; or whether the testatrix executed the will in the erroneous belief that those legacies had been given by the will, and Gard knew that she did so. The jury found that the testatrix had given instructions to Gard for legacies to Gillard, Perriam, and Egg; that at the time of the execution of the will those instructions were present to his mind; that they were absent from hers, and that he knew them to be so. The learned judge thereupon directed the verdict to be entered for the plaintiffs on the third issue, giving to the defendants leave to move to enter it in their favor. A rule *nisi* for that purpose having been granted, cause was shown against it on the 15th of May, when the cases of *Barry v. Butlin*, 2 Moo. P. C. 480; and *Mitchell v. Thomas*, 6 Moo. P. C. 137, were cited to show that when a person prepares a will by which he is largely benefited, and the capacity of the testator is at all doubtful, it is necessary to prove that instructions were given by the testator, or that the will was read over to him, or that by some other means he was fully acquainted with its contents.

Those cases have no bearing on the question now to be determined, for the testatrix gave instructions for all that was in the will; it was read over to her, and the jury found that she was of sound mind, memory, and understanding, which is not now disputed. The real question is, whether that which she heard read, and approved, and executed, is or is not her will, because she forgot at the time that she had desired other legacies to be given, which were not inserted. Before the Statute 1 Vict. c. 26, many wills were brought under the consideration of the Prerogative Court, when it appeared that they did not contain all that the testator intended. The cases on the subject may be divided into two classes: one, where there was on the face of the will, as executed, some ambiguity or incongruity which indicated that something must have been omitted by mistake, and in them evidence was received of the testator's intention, and the omission supplied. The other class was where there was nothing on the face of the will to indicate that a mistake had been made, and the principle of law applicable to them was very clearly stated by Sir John Nicholl in *Bayldon v. Bayldon*, 3 Add. 232. He says: "Where a will has nothing doubtful or incongruous on the face of it, suggesting itself the probability of some casual error to account for this in the body of the will, extrinsic evidence of the testator having meant other than the will expresses is inadmissible, as the court after and notwithstanding such evidence would still be bound to pronounce for the will." And again, in *Shadbolt v. Waugh*, 3 Hagg. 573, the same learned judge, with reference to an alleged omission, said, "It may be possible that the non-

insertion escaped his observation when the will was read over, but that is not sufficient."

The omission of the legacies therefore did not prevent the will propounded from being the will of the deceased. There is nothing to show that at the time when it was executed she believed it to be other than it really was; as far as this question is concerned, I think it makes no difference whether the legacies were omitted by accident or intentionally, nor can it make any difference that Gard remembered the legacies, and knew that she had forgotten them. But also the will was executed by her intending that it should be her will; if her execution of it had been obtained by fraud, the case would be different. The knowledge of Gard may raise a suspicion against him, but fraud was not pleaded, nor do I learn from the learned judge's notes that it was imputed, nor was any question put to the jury on the subject.

The point reserved must therefore be determined apart from any presumption of fraud, and on the authority of the cases cited, as well as the reason of the thing, I am of opinion that the writing propounded was the will of the testatrix, and that the rule for entering a verdict for the defendants on the third issue must be made absolute.

Mr. Collier, Q. C., *Mr. Coleridge*, Q. C. (*Dr. Wumbey* and *Mr. H. C. Lopes* with them) in support of the rule.

Mr. Karslake, Q. C. (*Mr. H. T. Cole* with him), showed cause.

STANLEY v. STANLEY.

CHANCERY. 1862.

[*Reported 2 J. & H. 491.*]

BILL filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying that issues might be directed whether certain words were part of the will.¹

Thomas Assheton Smith, the husband of the testatrix, died in 1858, seised in fee of real estate of great value in Wales, of a house at Tedworth in the county of Hants and adjoining property, partly in the same county, and partly in the county of Wilts. He devised all his real estate to the testatrix, who was his widow. She died in 1859, leaving a will which contained the following clause:—

"I give and devise my mansion-house at Tedworth in the county of Hants, and all my manors, farms, lands, tenements, and hereditaments *in the county of Hants* devised to me by the said will of my said late husband (subject to the annuities charged thereon by such will, and subject to an additional or further annuity of £50 per annum to be payable to Atwell, the valet of my late husband, during his life as

¹ Only that part of the case and opinion which relates to the prayer for issues is given, and a short statement is substituted for that in the report.

hereinafter mentioned), and all other hereditaments in the said county of Hants of or to which I shall be seised or entitled, or as to or over which I shall have a disposing power by any will at the time of my death (all which hereditaments *in the county of Hants* are hereinafter described or referred to as my Tedworth estate) to the uses and subject to, with, and under the provisos, powers, and devises hereinafter contained."

The bill contained, among other allegations, the following:—

"In giving instructions for the devise of her Tedworth estate, or of the manors, farms, lands, tenements, and hereditaments which in the said will are described as devised to her by the will of her late husband, subject to the amounts charged thereon by such will, the said testatrix did not mention or allude to the county of Hants, and the reference to the said county in the devise was introduced by mistake and without her instructions; and in particular the words *in the county of Hants* as they appear in [certain specified parts of the will, being the portions hereinbefore printed in italics] form no part of the will of the said testatrix."

The bill prayed that a proper issue or proper issues *devisavit vel non*, might be directed as to the said devise, and in particular whether the words *in the county of Hants*, in the places before mentioned, did or did not form part of the will of the said testatrix; and that it might be declared, that, according to the true construction of the will, the whole of the freehold manors and hereditaments, as well in Wilts as in Hants, forming part of the Tedworth estate, were well devised, and were subject to the limitations contained in the will in respect of the hereditaments called "my Tedworth estate."

Evidence was gone into as to the nature and circumstances of the property and of its acquisition, and evidence was also tendered to the effect that the restrictive words "in the county of Hants" formed no part of the instructions, but were introduced by the solicitor under a mistaken impression that the whole estate was in that county.

Mr. Rolt, Q. C., and *Mr. Martindale*, for the plaintiff; and *Sir Hugh Cairns*, Q. C., and *Mr. Lonsdale*, for defendants in the same interest.

Mr. Daniel, Q. C., and *Mr. G. L. Russell*, for the trustees, followed in the same interest.

Mr. Giffard, Q. C., and *Mr. Hobhouse*, for the heir-at-law.

VICE-CHANCELLOR SIR W. PAGE WOOD. This is a bill filed to obtain a declaration as to the construction of the will of Matilda Assheton Smith, and also praying for an issue *devisavit vel non* to ascertain whether certain words formed part of the will of the testatrix.

On the latter point I have felt no hesitation from the first. It is clearly impossible to grant any such issue as the plaintiff asks.

Authorities were cited; among others, *Hippesley v. Homer* [T. & R. 48 n.], and *Newburgh v. Newburgh*, from which it appears that in certain cases the court will direct an issue whether particular words found

in the instrument formed part of a testator's will. For the present I will put aside all cases of fraud, and refer only to those where the object has been to strike out some passage from a will on the ground of mistake. In *Powell v. Mouchett* [6 Mad. 216], Sir J. Leach laid it down, that it was impossible to have an issue whether a clause was introduced by mistake; but that an issue might be directed whether a particular passage was really a portion of the will, putting as an illustration the case of a manifest interpolation. An issue, for the purpose of ascertaining whether certain words were in the will at the time of its execution, would be very proper. In the present case there is no dispute that the words which the plaintiff desires to strike out were there when the will was executed, and the issue would only be to ascertain whether the solicitor who prepared the will introduced them by mistake. There is no authority for an issue under such circumstances; and, on the other hand, there are some observations of Chief Justice Tindal in *Miller v. Travers* [8 Bing. 244], which are extremely pertinent, and, indeed, unanswerable. Referring to a proposal to introduce new words by evidence, the Chief Justice says, "If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to introduce new matter of devise or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended by the Statute of Frauds would be entirely destroyed and the Statute itself virtually repealed."

If property were devised to A. B. for life, an issue might be asked for the purpose of striking out the words "for life," and converting the interest into a fee simple. This would not be more absurd than striking out restrictive words for the purpose of enlarging the subject-matter of a devise.

[The learned judge then proceeded to the question of construction. This part of the case is omitted.]¹

¹ See *Iddings v. Iddings*, 7 S. & R. 111 (Pa. 1821); *Chappel v. Avery*, 6 Conn. 81 (1825).

"When a testamentary instrument offered for probate is executed and attested as required by statute, and has not been revoked or cancelled, only three questions can arise: 1st. Was the testator, at the time of executing the instrument, of sound and disposing mind and memory, capable of understanding the nature of the act he was doing and the relation in which he stood to the objects of his bounty and to the persons to whom the law would have given his property if he had died intestate? 2d. Was the instrument executed under fraud or undue influence, by which his own intentions were controlled and supplanted by those of another person? 3d. Did he execute the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament? . . .

"In a court of probate, it may doubtless be shown by parol evidence that the alleged testator, at the time of signing the instrument, did not understand that it was a will, or intend that it should operate as such. *Swett v. Boardman*, 1 Mass. 258. *Osborn v. Cook*, 11 Cush. 532, 535. But if, being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a

GOODS OF DUANE.

COURT OF PROBATE. 1862.

[*Reported 2 Sw. & Tr. 590.*]

In this case the deceased, a sergeant-major in the 64th Regiment of Foot, died on the 3d of October, 1861, having duly executed a testamentary paper by his mark, on the same day. The paper consisted of a skeleton printed form, supplied by the War Office; in the present instance headed, in print: "Form of will, No. 3. To be used by a soldier desirous of leaving money to be invested for the benefit of his child or children;" and, after some printed and some blank lines, with printed directions alongside for particular bequests, it ended in print thus: "And the rest of my estate and effects, and everything that I can give or dispose of, I desire may be sold, and the proceeds invested under the orders of the Secretary of War, for the equal benefit of my children. In witness whereof I the said have hereunto set my hand," etc.

From the affidavit of C. F. F. Wood, a clerk in the military purveyor's department of the War Office, and one of the subscribed witnesses to the mark of the deceased, it appeared that he was sent for on the 3d of October, 1861, to prepare the will for the deceased, who was then in hospital; that he took with him the above-mentioned printed form; but on seeing the deceased, received from him instructions to prepare his will, leaving the whole of the property to his wife; and accordingly, after the printed line, "after payment of my just debts and funeral expenses, I give to my," filled up in writing, "wife, Elizabeth Duane. all my goods and chattels." Wood then read over to the deceased, from the paper so printed and filled up in writing, "This is the last will of Sergeant-Major Thomas Duane, No. 3160, of the 64th Regiment of Foot. After payment of my just debts and funeral expenses, I give to my wife, Elizabeth Duane, all my goods and chattels." He did not read the remainder of the printed form, or advert to it as

knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms and solemnities which the statute makes essential to the validity of a testamentary disposition."—*Per GRAY, J., in Barker v. Comins*, 110 Mass. 477, 487–489 (1872).

See *McAlister v. Butterfield*, 31 Ind. 25 (1869).

A paper, in form a will, but not really intended as such, as where it was made to show in how short a form a will could be drawn, (*Nichols v. Nichols*, 2 Phillim. 180, 1814), or to induce a third person to believe a will had been made, (*Lister v. Smith*, 3 Sw. & Tr. 282, 1863, *Fleming v. Morrison*, 187 Mass. 120, 1904), but not intended to be operative, will not be admitted to probate. So when one paper is signed by mistake for another, it is not a will, *Goods of Hunt*, L. R. 3 P. & D. 250 (1875).

having any effect, but filled up the testimonium clause, and the deceased then made his mark.

Dr. Swabey now moved the court to grant letters of administration with the will annexed to the widow, omitting the residuary clause in favor of the children.

Cur. adv. vult.

SIR C. CRESSWELL, after stating the facts as above, said: *Allen v. M'Pherson* [1 H. L. C. 191], decided in the House of Lords, shows that a Court of Probate has authority to omit from probate a clause introduced into a will by fraud, although it formed part of the will when executed. I can see no difference in principle between that case and the present one, where a clause, for which the deceased gave no instructions, and which was not read over to him, formed, *per incuriam*, part of the document signed by the deceased. I think administration with the will annexed may go, omitting the residuary clause in favor of the children.

GUARDHOUSE v. BLACKBURN.

COURT OF PROBATE. 1866.

[Reported L. R. 1 P. & D. 109.]

THE defendants in this case were the executors under the will and codicil of Mrs. Hannah Jameson, late of Netherton, in Cumberland, who died on the 29th of August, 1863. The plaintiffs were the residuary legatees named in her will. The will was dated the 30th of May, 1851, and the codicil the 13th of April, 1852, and both were proved in common form by the defendants, in October, 1863. The probate had since been called in by the plaintiffs, and the will and codicil were pronounced by the defendants in the ordinary declaration.

By the will the testatrix disposed of three different estates, called Folds, Scales, and Stainton; the estate of Scales she charged with legacies to the amount of £500, and that of Stainton with eight legacies of the amount of £100 each. She duly executed a codicil to her will in the following terms:—

“This is a codicil to the will of me Hannah Jameson, of, &c., which will bears date the 30th day of May, 1851. I revoke the bequest of £100 therein made to my nephew, Edward Blackburn, and in lieu thereof I give him £200. I give and bequeath the legacy or sum of six hundred pounds, equally, unto, between, and amongst the therein named Samuel Jameson, John Jameson, Dorothy Smith, Margaret Armstrong, Jane Jameson, and Mary Ann Jameson; the said Jane Jameson and Mary Ann Jameson taking one-fifth share only, upon the same conditions, and under the same limitations in all respects as I have in my said will devised my estate of Folds in their favor.

I release and discharge my said estate from the payment of the legacies therein given to my executors, and I direct all the legacies *therein and* herein given (and not revoked) to be paid out of my personal estate. In all other respects I ratify my said will. In witness whereof, I have hereunto set my hand, this 13th day of April, 1852. Hannah Jameson."

The plaintiffs admitted the due execution of the will and codicil, and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate in lieu of; and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the amount of £500, and of the estate of Stainton of the payment of legacies to the amount of £800, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased.

William Carrick said in examination: he took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1,300; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Dr. Deane, Q. C. (Dr. Tristram with him), for the defendants.

Dr. Spinks (Mounsey with him), for the plaintiffs.

Cur. adv. vult.

SIR J. P. WILDE. The plaintiffs have cited the defendants, to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof.

The effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will.

The ground upon which the court is asked to expunge them, is that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proved to be the fact (if the evidence is admissible and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions.

It is not, however, denied that the codicil, as it stands, was read to the testatrix, and duly executed by her. Questions of vital importance to the integrity of the present testamentary system are here raised. It devolves on the court to endeavor to disentangle the line of demarcation between what the law allows and what it refuses, to the natural desire of giving effect to what are supposed to be the testator's wishes, and to set clear the limits within which any script duly executed can be shorn of its full testamentary effect, by reference to any other source of information. I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the ecclesiastical courts on this head. Under that law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former.

Hence the class of cases in which those courts have gone farthest in violating the integrity of an executed paper. They will be found collected in the argument of Dr. Addams, in the case of *Fawcett v. Jones and others*, 3 Phill. at p. 450, a case remarkable for the evident hesitation and reluctance with which Sir John Nicoll accepted the full results of the principle involved in the previous decisions. His judicial foresight enabled him to turn aside from the brink to which these decisions were urging him; and he refused to pass over a line, which, once passed, would have set all wills at the mercy of parol evidence, and "introduced (as he said) a most alarming insecurity into the testamentary dispositions of all personal property." The most prominent of these cases was *Blackwood v. Damer*, 3 Phill. 458. It was appealed to the delegates, who affirmed the decision of the court below, and permitted a will which had been duly signed with full knowledge of its contents, and which contained no residuary clause, to be supplemented

by instructions in the testator's own writing, giving the residue to his daughter, granting probate of the will, and that part of the instructions as together constituting the will, and this on the ground of mistake, proved by the attorney and corroborated by the written paper of instructions. This case was much relied on in argument here. But the words of the Wills Act, "No will shall be valid" unless executed in a certain manner, obviously exclude the probate of unexecuted instructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. It is conceded ground in the argument, that this court cannot any longer admit to probate any paper, whatever its form, which is not executed according to the Statute. This class of cases, therefore, is of no authority in reference to wills made since 1838, and, in deciding the present case, may be laid aside. But then comes the question, if the court cannot now, as it could before the Statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. Nothing is less satisfactory than a perusal of the cases decided in the Prerogative Court under this head. In some cases, parol evidence was excluded, and in some admitted, without any sufficient difference in principle to sustain the distinction. I venture to think that the Ecclesiastical Courts created a difficulty (perpetually recurring) for themselves, when they attempted to adopt the well-known rules as to parol evidence, and patent and latent ambiguities, existing in the courts of law and equity, to cases of probate, to which such rules were not properly applicable. For the question in such cases is not what intention ought to be assigned to the words of a given written paper, but to what extent does a given written paper express the testamentary intentions of the deceased. And the function of the court is not to construe a written paper, the validity of which is admitted, but to gather the necessary facts, and pronounce on the validity of the paper. Although it be right to adhere to the writing, and exclude all parol testimony in the former case, it is clearly impossible to do so in the latter. Indeed, the Court of Probate, setting about to ascertain the will of the deceased, could not stir a step in the inquiry without some proof beyond the mere writing. In the attempt to escape these rules, while keeping up the semblance of adhering to them, Sir John Nicoll, in the case above quoted, speaks of "an ambiguity in the *factum*" of the instrument, and makes that the ground of admitting parol evidence. But what, it may be asked, are all controversies as to the instrument, which should be pronounced to contain the testamentary intentions of the deceased, and to be his will, but cases in which some

ambiguity exists as to the *factum* of such instrument as a complete will? The truth is, that the rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect. Nor, indeed, are these rules pressed in the courts either of law or equity beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see *Pym v. Campbell*, 6 E. & B. 370. Or if (going farther still) some plain and palpable error has crept into the written document, equity formerly, and the courts of common law now, sanction the admission of evidence to expose the error: see the case of *Wake v. Harrop*, 6 H. & N. 768, and the paragraph there cited from Story's Equity Jurisprudence, at p. 772. On this head, then, the court may safely adopt the language of Mr. Justice Williams on Executors, vol. i. p. 313 (5th ed.): "In a court of construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited, for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will is made."

I may quit this branch of the subject with the observation that the foregoing remarks have a wider application to wills made before the Statute than since, for the Statute has much narrowed the field of inquiry; the principle, however, is the same. It is hardly necessary to add, that where the Court of Probate has (as is often the case) to construe one admitted testamentary paper, for the purpose of ascertaining another, it acts as a court of construction, and is guided by the same rules. Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs to what extent is it still open to the court since the Statute, to act upon such evidence, for the purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? A more important inquiry could hardly arise. For you may as effectually incline the balance by taking out of one scale as by adding to the other, and it is quite as easy to vary the effect of a will in any given direction by leaving words out as by putting them in. After much consideration, the following propositions commend themselves to the court as rules which, since the Statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the

contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole. The first and second of these propositions are amply established by the case of *Barry v. Butlin*, 2 Moo. P. C. 480, and others of that class in the Privy Council. The third was also well approved law in the Ecclesiastical Courts, for there must be an *animus testandi* to constitute a paper testamentary. The fourth requires no comment, and the last is justified by the case of *Allen v. M'Pherson*, 1 H. of L. Cas. 191. It remains to say a few words on the fifth. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the Statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the Statute would thus perish at the hands of the court. I have thus endeavored to place the use of parol evidence in these matters on its true ground. The general rule for excluding it in our courts is based upon the proposition that written testimony is of a higher grade — more certain, more reliable — than parol, and that resort should be had to the highest evidence of which a subject is capable, to the exclusion of the inferior class. But it is one thing to admit evidence, and another to give effect to it. If a Statute require that a thing should be in writing and signed, in order to its validity, it precludes the court from giving effect to parol testimony of that which is required to be so written and signed. And if it be said, why, then, admit parol evidence on the subject at all? The answer is, that if the scope of such evidence can be clearly known before it is heard, it should be excluded; but then only on the ground of immateriality, not because it is secondary. In actual practice a large number of cases are so presented that it is impracticable to reject evidence as immaterial before the details of it are known. Little need be added as to the operation of these principles upon the present case. The codicil was proved to have been read over to the testator before the execution thereof, she

duly executed the same, and the court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.¹

HARTER v. HARTER.

COURT OF PROBATE. 1873.

[*Reported L. R. 3 P. & D. 11.*]

SIR J. HANNEN.² In this case the plaintiffs, two of the executors of the will of the Rev. George Gardner Harter, deceased, dated the 6th of June, 1862, propound the said will, together with a codicil thereto of the 31st of August, 1863, and in their declaration allege that the word "real," which immediately precedes the word "estate" in the residuary clause of the will was inserted in the said residuary clause by error, contrary to the instructions of the testator, and was retained therein at the time of the execution of the will, without his knowledge or approval, and that by reason thereof the said word "real" is not entitled to be included in the probate. One of the defendants, Elizabeth Jessie Harter, the widow and remaining executrix of the will, has pleaded denying that the word "real" was inserted in the residuary clause by error, contrary to the instructions of the deceased, and that the said word "real" was retained therein without the testator's knowledge and approval, and a further plea that the will with the word "real" in the residuary clause was read over by and to the said testator, who was competent to, and did, understand the same; that the testator at the time of the execution of the said will knew and approved of the contents thereof as the same now appear; and, lastly, that the testator, after executing this said will, duly executed the codicil thereto, dated the 31st of August, 1863, and thereby confirmed, and, in law, re-executed his said will as the same now appears. These portions of the pleadings are sufficient to show the questions which arise for decision in the cause. By the settlement executed on the marriage of the deceased, he had, with his wife, a joint power of appointment of moneys, amounting on the whole to £65,000, for the benefit of one or more of his children. By a subsequent settlement certain freehold and copyhold hereditaments in the county of York stood at the time of the execution of the will in question limited to the use of the deceased and his assigns for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The deceased was also possessed of real estate of considerable

¹ See *Fulton v. Andrew*, L. R. 7 H. L. 448 (1875); *Brisco v. Hamilton*, L. R. [1902] P. 234.

² The opinion only is here printed.

value, and of personalty of the value of about £200,000. In this state of things, the deceased, on the 1st of May, 1862, after full explanation from his solicitor, Mr. Slater, of the position of affairs in reference to the said settlements, gave him oral instructions for the preparation of his will. Mr. Slater, in the presence of the deceased, wrote a memorandum of these oral instructions. The deceased also instructed him to prepare a joint appointment under the power in that behalf in the marriage settlement, and this was, as stated by Mr. Slater, part of the scheme the testator wished to be carried out in connection with his will. The memorandum of the instructions for the will is before the court, and is as follows: "Give to wife, Elizabeth Jessy Hall, provisions, wines, liquors, carriages, horses, harness, live and dead stock in and about my dwelling-house and farm at Cranfield, except plate and furniture, with £1,000 legacy to wife absolutely. Set apart a sum sufficient to raise an annuity of £2,000 per annum to Mrs. Harter for life, with powers of investment. Give to Mrs. Harter the privilege of occupying, rent free, the house, outbuildings, garden, and pleasure-grounds at Cranfield Court, until eldest son for the time being shall attain twenty-five years of age, provided she so long remains my widow; and during such occupation of the house Mrs. Harter to have the use of the plate and furniture without liability to loss or breakage. Limit (subject to interest in Cranfield Court given to Mrs. Harter) the Cranfield and other estates in Bedfordshire or Buckinghamshire, including the advowson of Cranfield, and the plate to like limitations as the Yorkshire estate, subject to previous trusts. Give furniture at Cranfield Court to eldest son for the time being on attaining twenty-five. Also give him £20,000 on attaining twenty-one. Give legacy of £10,000 to each of my daughters, Sophia Elizabeth, Jessy H., and Eleanor Maude H., on twenty-one or marriage. And the residue equally among all the sons, including the eldest for the time being, on attaining twenty-one. Maintenance, education, and advancement clauses during minority, as usual. Trustees and executors, my wife and my brother, James Collier Harter." Mr. Slater subsequently handed this memorandum to his managing clerk, Mr. Howarth, who drew up a draft will. In this draft the residuary clause is drawn in the following words: "And subject to the interests hereinbefore contained, upon further trust to stand possessed of all the residue and remainder of my real estate, in trust to divide the same equally between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain their respective ages of twenty-one years, for their own use and benefit absolutely." A joint appointment providing for the equal division of the funds settled by the marriage settlement was also drawn up. On the 2d of May Mr. Slater handed to the deceased a fair copy of the draft for his perusal; and on the same day the draft of the joint appointment was also furnished to the deceased. On the 6th of May the deceased returned to Mr. Slater the draft will, as to which, after stating that he had carefully

perused it, he suggested certain alterations. These were afterwards embodied in the draft in red ink, and the draft, so altered, was again returned to the deceased. Between this time, the 9th of May, and the execution of the will on the 6th of June, several letters passed between the deceased and Mr. Slater on the subject of the will, which clearly show that the deceased read and fully considered the will, and suggested an alteration in the residuary clause, by which the eldest son was to take a share equal to two of his brothers' shares; but no reference is made in the correspondence to the terms in which the residuary clause was worded, and it remained, with the exception of the above-mentioned alteration, as drawn in the first draft, and was so copied into the will, which was ultimately executed. Mr. Howarth, the managing clerk to Mr. Slater, was called as a witness, and stated that he understood the word "residue" in the instruction, to mean "real and personal," but that by inadvertence he drew it as it now stands, and never noticed the error. Mr. Slater also stated that the terms of the residuary clause entirely escaped his attention. Upon the evidence afforded by the documents in the cause as well as by the oral testimony of the witnesses, I entertain no doubt that the residuary clause, as it stands in the will, does not express the real meaning of the testator. It was not his intention that there should be an intestacy as to his residuary personalty, but that he intended that such residue should be divided amongst his sons, the eldest taking two shares. It is necessary that I should state what appears to me to have been the exact nature of the error by which a failure to express the true intention of the testator has arisen. I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause. The memorandum of instructions drawn up by Mr. Slater, deals with realty as well as personalty, and then proceeds to dispose of the residue. This, without qualification, would mean the residue of the testator's property generally, real and personal; and so it was understood by Mr. Howarth, who drew the will. It makes no difference in my judgment, that the testator had not at the time any other realty than that which he had specifically disposed of. That fact may possibly have made him or Mr. Slater careless in the use of a general term wide enough to include realty, if it had existed, but it does not negative an intention on their part to use the word in its ordinary and more extended sense. There was no intention on the part of the testator to leave an intestacy as to any other real estate which he might possess or acquire, but in the belief that he had not and probably would not have any, he was content to use language wide enough to include it. Nor does the fact that the language of the residuary clause in disposing of the residue is rather applicable to personalty, make any difference. On this point the observations of Lord Cottenham in *Saumarez v. Saumarez*, 4 M. & Cr. at p. 340, may be referred to. "The circumstances of the testator using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that realty would be

part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property;" and again, at p. 339, "In considering gifts of residue, whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against a testator having overlooked some property or interest in the gifts particularly described." This view of the facts leads me to a conclusion which is decisive of the case. I think it is not in the power of the court to supply words accidentally omitted from a will. The Wills Act (1 Vict. c. 26, § 9) admits of no qualification. "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned," that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personality of the deceased fulfilling the requirements of the Act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. "With respect to wills made on or after January, 1838," says Sir E. V. Williams (1 Wm. Exors. 345, 6th ed.), "it is plain that by reason of the provisions of the Statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing and attested pursuant to the Act. Whence it follows that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that Statute extends." This disposes of the numerous cases, which were cited in argument, of dates anterior to 1 Vict. c. 26; and with regard to wills to which that Statute is applicable, it has not been suggested that the court can admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will. But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words "and personal" were omitted, but that the word "real" was inserted, and that the will ought to be made to read "all the residue and remainder of my estate." I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word "real" from the residuary clause. There are undoubtedly numerous cases which establish that this court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of *Fawcett v. Jones*, 3 Phillim. 434, which, though relating to wills before the Statute 1 Vict. c. 26, are on this head applicable to wills of a later date. And in the case of *Allen v. M'Pherson*, 1 H. L. C. at p. 209, Lord Lyndhurst said, "It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as to the rest." Lord Campbell (1 H. L. C. at p. 233) in the same case says, "It is quite clear that the Ecclesi-

astical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because, giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon, and probate of that part of the codicil ought to have been refused." In that case fraud was the ground on which it was sought to expunge a part of a codicil; but *In the Goods of Duane*, 2 Sw. & Tr. 590, Sir C. Cresswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. Sir C. Cresswell, after referring to *Allen v. M'Pherson*, said: "I can see no difference in principle between that case and the present one, where a clause for which the deceased gave no instructions, and which was not read over to him, formed *per incuriam* part of the document signed by the deceased." The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the court is asked to remedy the mistake, not by rejecting words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will. The theory of the plaintiffs, is that the testator had his personalty only in his mind, when he gave instructions for the residuary clause, because he had no realty undisposed of. If so, the proper mode of carrying out the instructions would have been to say, "the residue of my personal estate;" and in that case the error consists in having substituted the word "real" for "personal." Upon this hypothesis the court is asked to strike out the word "real," not because the clause would then be in the form the testator intended, but because it would in its transformed shape substantially carry out the testator's wish. It is also to be observed, that not only the form, but probably the effect would be different; for a bequest of the residue of the testator's estate would, according to the modern decisions, include the realty, unless the context clearly excluded it: *Jarm. on Wills*, ch. 22; *The Mayor and Corporation of Hamilton v. Hodsdon*, 6 Moore P. C. 76. Such a mode of dealing with wills would lead to the most dangerous consequences; for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come

before the courts of law and equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked, first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended. If I felt myself at liberty to adopt such a course, I should think that the best amendment of the will would be to leave the word "residue" by itself in the residuary clause as it is in the memorandum of instructions. But it is obvious that, though this might give effect to the testator's wishes in this instance, it would be by an accident; for the word "residue," taken with the context of the will, might have had a different effect to that which it has in connection with the context of the instructions; but, for the reasons I have given, I entirely repudiate this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this court to correct it. I have thus far considered the case, apart from the decision of Lord Penzance in *Guardhouse v. Blackburn*, Law Rep. 1 P. & M. 109, but I must add that it appears to me that that is an authority directly decisive of this case in favor of the defendants. It was there established to the satisfaction of the court that specific words had been inserted by the attorney who drew the codicil by mistake, and without instructions. Yet the learned judge held that as the contents of the codicil had been brought to the knowledge of a competent testatrix, the execution of the instrument must be deemed conclusive evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document. The conclusion I have arrived at makes it unnecessary that I should express a positive opinion on the effect which the execution of the codicil would have had on the will, if I had thought that the word "real" ought to be expunged from the residuary clause, but I am strongly inclined to think that it would have made no difference, and that the codicil must be held to confirm only that which was the true will of the testator. For these reasons I pronounce for the will in its present form.

Dr. Spinks, Q. C., and *Dr. Tristram*, appeared for the plaintiffs.

Inderwick and *Mellor* appeared for the respective defendants.¹

¹ "When an instrument purporting to be the will of the deceased person has been executed by the deceased in the proper manner, but it is sufficiently proved that though

GOODS OF OSWALD.

COURT OF PROBATE. 1874.

[Reported L. R. 3 P. & D. 162.]

MARTHA OSWALD, of Beccles, Suffolk, widow, deceased, died on the 21st of March, 1873, having made a will with two codicils thereto, dated respectively the 3d of March, 1859, and the 3d of March, 1865, and one codicil without date. By the will she appointed James Read the younger and Henry James Kerrison executors and trustees. She gave to her daughters, Georgina Emily Crisp and Sarah Read, to and for their uses absolutely, all her household goods, and furniture, plate, china, wearing apparel, and consumable stores, and the residue to her two sons, Robert William Oswald and William Oswald, and the two daughters above-mentioned, equally, for their uses absolutely. On the 7th of December, 1872, she executed another testamentary paper to the following effect: "This is the last will and testament of me, Martha Oswald, of Beccles, in the county of Suffolk, widow, whereof I appoint James Read the younger, of Mildenhall, Suffolk, gentleman, and Henry James Kerrison, of Beccles, aforesaid, gentleman, executors. I give and bequeath all my furniture, plate, linen, china, books, and all other household effects now belonging to me, unto Georgina Emily Crisp, the wife of James Crisp, of Beccles, aforesaid, coal merchant, for her own separate use and benefit, free from all control, debts, or interference of her said husband, the said James Crisp. I hereby revoke all former

he executed the instrument, yet that from fraud he executed that which was not his will, there is no difficulty in pronouncing that the instrument is not his will. And it has been held that when it is sufficiently proved that the instrument comprised his will, but that from fraud, or perhaps from inadvertence, such as that *In the Goods of Duane*, the instrument which he actually executed contained also something which was not his will, this latter part is to be rejected. And in such a case, if this latter part is so distinct and severable from the true part that the rejection of it does not alter the construction of the true part, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone. A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. 4 & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning. It has never, as far as their Lordships are aware, been necessary to decide as to this, though the judgment of Sir James Hannen in *Harter v. Harter* has some bearing on it. And their Lordships think it unnecessary and therefore improper now to express any opinion on this question, for the evidence does not raise it." — *Per LORD BLACKBURN* in *Rhodes v. Rhodes*, 7 Ap. Cas. 192, 198 (1882).

wills by me heretofore made. It witness," &c. It appeared from the affidavit of Mr. Kerrison that in December, 1872, he saw and had a conversation with the deceased upon the subject of her will and the manner in which her household furniture was to be disposed of. James Crisp, the son-in-law of the deceased, to whose wife a portion of such furniture was bequeathed by her will, was in pecuniary difficulties, and he therefore suggested to Mrs. Oswald that she should secure the furniture for the sole and separate use of her daughter, free from the control, debts, or interference of her husband. The deceased assented, and instructed him (Mr. Kerrison) to have a document, carrying out the suggestion, prepared. Mr. Fiske was requested to draw up the proper instrument for the purpose, and prepared the will dated the 7th of December, 1872, which was sent to Mr. Kerrison, who, accompanied by his wife and Georgina Cowles, the two attesting witnesses, attended upon the deceased, when it was duly executed by Mrs. Oswald. The paper was never read over by or to the deceased before she executed it, and she was not aware of the clause of revocation contained therein. No instructions were given to Mr. Fiske to insert such a clause, and it never was the intention of the testatrix to revoke the dispositions made by her of her property, except so far as to secure the bequests made to her daughter. The whole property of the deceased was in value under £200. All the next of kin and the parties entitled in distribution in case the deceased had died intestate consented to probate being granted as asked for by this motion.

G. H. Cooper applied to the court to decree probate of the will dated the 3d of March, 1859, and of the two codicils thereto, as also of the paper dated the 7th of December, 1872, as together containing the will of the deceased, excluding from the last the clause of revocation. He referred to *In the Goods of Duane*, 2 Sw. & Tr. 590; 31 L. J. (P. M. & A.) 173.

SIR J. HANNEN. It was clearly not the intention of the deceased to revoke her previous will. From the facts stated in the affidavit it is evident that the words of revocation were introduced into the last paper *per incuriam*, and therefore probate will issue without them.¹

¹ *Morrell v. Morrell*, L. R. 7 P. D. 68 (1882); *Goods of Gordon*, L. R. [1892] P. 228, *accord*.

GOODS OF BUSHELL.

PROBATE DIVISION. 1887.

[*Reported L. R. 13 P. D. 7.*]

SAMUEL H. BUSHELL, late of Worcester Park, in the county of Surrey, died June 8, 1887, leaving a will duly executed dated November 27, 1885. The will was prepared by his solicitor from his instructions, which were read over to him and fully explained, and on November 26, 1885, he executed a draft, which was also read over to him. When the engrossment of the draft was brought to him next day, he asked whether it corresponded with the draft, and being assured that it did, he did not require it to be read over to him, but executed it without further examination. Among other bequests in the will was a legacy of £5000 to the "British" Royal Infirmary, but in the executed draft the bequest was to the "Bristol" Royal Infirmary, which it appeared from the affidavits expressed his real intention.

B. Deane, moved for probate with the substitution of the word "Bristol" for "British." There is no reported case exactly in point, but in *Morrell v. Morrell*, 7 P. D. 68, where there was a bequest of "all my '40' shares," the Court ordered the "40" to be struck out on the jury finding that the testator intended to bequeath all his shares, which were actually 400.

BUTT, J. I see no reason why the alteration should not be made: I will grant probate with the word "Bristol" inserted instead of the word "British," on the production of an affidavit that there is no such institution as the "British" Royal Infirmary.

GOODS OF BOEHM.

PROBATE DIVISION. 1891.

[*Reported L. R. [1891] P. 247.*]

MOTION for a grant of probate of a will with certain alterations.

The testator, Sir J. E. Boehm, R.A., died December 24, 1890, leaving a will duly executed bearing date December 12, 1889.

The instructions for the preparation of the will were given to Mr. Mills, an old friend, who conveyed them to the testator's solicitor, by whom they were laid before counsel to prepare a draft will.

From the affidavits of these gentlemen it appeared that by his instructions the testator directed that two sums of 10,000*l.* each, part of a

specific sum of 24,000*l.* dealt with in the will, should be set apart to be settled to the use and benefit of his two unmarried daughters, Miss Georgiana Boehm and Miss Florence Boehm, and their children, after the death of his wife, who was to have the life interest if she survived him. By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters, and omitted the word "Florence" altogether; so that there were two gifts of 10,000*l.* to Miss Georgiana Boehm, while Miss Florence Boehm was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will, together with an epitome of its provisions, were taken to the testator by Mr. Mills. The draft was never read over to him, but the epitome was. In the epitome the names "Georgiana" and "Florence" were accurately given, and the testator read it over and made corrections in it. The testator did not read the will over at the time of execution, and it was perfectly certain that his attention was not drawn to the mistake, which was only discovered after his death.

JEUNE, J. I am asked to grant probate of the will of Sir Joseph Edgar Boehm with the word Georgiana omitted in two places, in what, on the face of the will, professes to be a gift in her favour. I had some doubt about deciding this matter on motion; but as representatives of all existing interests agreed to its being so decided, and future interests will be protected rather than prejudiced by this mode of dealing with this question, I see no objection to adopting it. It is clear from the evidence that the testator intended to give 20,000*l.* in equal moieties to trustees for each of his daughters, Florence and Georgiana, and the instructions for the will correctly expressed this; but the draftsman, instead of inserting in the draft of the will a clause of gift in favour of Georgiana, and then a similar clause in favour of Florence, inserted the name of Georgiana in the second clause as well as in the first. It is proved that the testator did not read or have read over to him the will, but did read what professed to be an epitome of it, such epitome being in accordance with the instructions, and correctly representing the testator's intentions. In a sense, therefore, the word Georgiana was clearly inserted in the two places in question in error, though the real and complete mistake was in not inserting Florence in place of Georgiana. In view of the case of *Morrell v. Morrell*, 7 P. D. 68, following *Fulton v. Andrew*, Law Rep. 7 H. L. 448, and the earlier authority of *In the Goods of Duane*, 2 S. & T. 590, mistake is to be regarded as a question of fact depending on the circumstances of each case, and there is now no difficulty, in circumstances such as those of the above cases, in striking out a clause, or a single word, if shewn to have been inserted by mistake. Indeed, in the present case no such difficulty occurs as arose in *Fulton v. Andrew*, Law Rep. 7 H. L. 448, in reference to the decisions in *Atter v. Atkinson*, Law Rep. 1 P. & D. 635, *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109, and *Harter*

v. *Harter*, Law Rep. 3 P. & D. 11, from a presumption of knowledge and approval arising from the reading of, or hearing read, a will by a competent testator, because here the evidence is that the testator, relying on the epitome, never read or heard the will read.

My difficulty at the argument was that, in the above cases, to strike out the word or words inserted in error left the will what the testator intended it to be. Here, to strike out the word *Georgiana* and to leave a blank in its place does not leave the will what the testator intended it should be, and I am not aware that there is any exact authority for striking a word out of a will under these circumstances. This case would seem to be the same as it would have been in *Morrell v. Morrell*, 7 P. D. 68, if the jury had found that the mistake consisted not merely in having put in the word "forty," but in not having put in the proper number, "four hundred," instead of "forty" — in fact, had answered the second question put to them differently from the way in which they did. The cases of *In the Goods of Bushell*, 13 P. D. 7, and *In the Goods of Huddleston*, 63 L. T. (N. S.) 255, refer, I think, only to the correction of clerical errors; and the language of the Judicial Committee in *Rhodes v. Rhodes*, 7 App. Cas. 192, points to the difficulty of rejecting words where their rejection alters the sense of those which remain. But I think that the application of the principle of striking out a word clearly inserted in mistake may be safely extended, if it be an extension, to a case where the effect of its rejection may be to render ambiguous, or even insensible, a clause of which it formed part. If a person by fraud obtained the substitution of his name for that of another in a will it would be strange if his name could not be struck out, although the rest of the clause in which it occurred became thereby meaningless. It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions. I am, therefore, willing to grant probate of this will as prayed with the omissions specified.

COLLINS v. ELSTONE.

PROBATE DIVISION. 1892.

[Reported L. R. [1898] P. 1.]

APPLICATION for probate.

Sarah Caroline Pinney, deceased, late of Belvedere, in the county of Kent, died March 9, 1891, leaving a will dated March 12, 1875; a codicil thereto dated July 21, 1885; and a will dated October 17, 1889, all duly executed.

The plaintiffs, who were the executors of all three testamentary papers, propounded them, but prayed that certain words of revocation contained in the last will might be omitted from the probate, as having been inserted by mistake and without the knowledge and approval of the deceased.

The defendant, Caroline Elstone, a cousin, and one of the next of kin of the deceased, opposed the grant of probate of the first two papers, and prayed for probate of the will of October 17, 1889, as it stood without the omission of the revocatory words.

The case was tried before the President without a jury.

It appeared from the evidence of the witnesses that the deceased and Miss Collins, one of the plaintiffs, were two maiden ladies, who for thirty years had lived together at Belvedere, in the county of Kent. They joined their incomes together, and had agreed to make mutual testamentary dispositions, with the view of securing to the survivor of them whatever the first who died might possess at the time of her death.

In pursuance of this arrangement Miss Pinney, the deceased, duly executed the will of 1875 and the codicil of 1885, which secured to Miss Collins a life interest in deceased's property, amounting to something under 300*l*.

Shortly before her death it occurred to Miss Pinney that if she died first Miss Collins might be in want of ready money to defray her testamentary and funeral expenses; and in order to provide this she insured her life for 50*l*. The other plaintiff, Mr. Tuffley, acted for her in effecting this insurance, and the deceased asked him to draw a will by which 30*l*. would be secured to Miss Collins, 10*l*. to Mr. Tuffley's mother, and 10*l*. to a clergyman. Accordingly, Tuffley procured a printed form, and filled it up to carry out the wishes of Miss Pinney.

At the commencement of this form were the words: "I hereby revoke all wills by me at any time heretofore made"; and it appeared that the testatrix, when these words were read over to her, at once objected to them, saying that if they revoked the will and codicil which she had already made in 1875 and 1885, she would not sign it, as she did not wish to alter the provision she had made for Miss Collins. Mr. Tuffley told her—and he swore that this was his honest belief at the time—that as the will she was then making referred only to the insurance money, and did not alter the provision she had made for Miss Collins by the previous will and codicil, these words would not have the effect of revoking those testamentary papers, and that to strike these words out of the form might make the whole will invalid. The testatrix made no further objection, but signed the will as it stood.

THE PRESIDENT. I cannot help regretting—as I suppose everybody would regret—that I am compelled to come to a conclusion the effect of which I am conscious will be that the real intentions of the testatrix

will not be carried out. But on the facts of the case the conclusion is quite clear. The last will contains words which in law revoke all previous wills. Those words were inserted, as I have no doubt, because the testatrix misunderstood their meaning, and I have no doubt how she came to misunderstand their meaning. It is clear on the evidence that the person who drew the will was ignorant — there is no fraud — as to the effect of putting that clause in, and doubly ignorant; for he told her it would be inoperative, and he told her further, if it was struck out the rest of the will would be vitiated. Misinformed by this statement, she allowed the clause to remain. The question is, Under these circumstances, can I strike it out consistently with the authorities? I am afraid I cannot. There are three cases to which I have been referred. The first is the case of *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109, where Lord Penzance's words lay down a canon which no doubt completely covers this case, because Lord Penzance says that, subject to a question of fraud, the fact that a will has been read over to a capable testator on the occasion of its execution, or its contents brought to the testator's notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved of as well as knew the contents. Then there is the case of *Atter v. Atkinson*, Law Rep. 1 P. & D. 665, to which I need not refer further, because Lord Penzance's view of the law is fully expressed in the case of *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109. The case of *Guardhouse v. Blackburn*, Law Rep. 1 P. & D. 109, is commented on in *Fulton v. Andrew*, Law Rep. 7 H. L. 448; but I do not think that any material difference with it was expressed. All that the Lord Chancellor seems to me to have pointed out is, that when that case was left to the jury it was not clear that the jury did not believe then that there was some fraud with regard to the insertion of the particular clause, or that they were satisfied that it was read over so that it was fully before the mind of the testator. Therefore, I do not think that on these cases I should strike out these words. Then Mr. Bray refers me to the case of *Morrell v. Morrell*, 7 P. D. 68, and it seems to me that the language used in that case expresses the law which is applicable to this case, and expresses what is some reason for it, because the view of Lord Hannen in that case is this, that if a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed that technical language himself. Now, that view appears to me exactly to meet the present case. This lady thought it right to employ this gentleman to make her will for her; she thought it right to trust to him. No doubt he was mistaken; but, according to the view of Lord Hannen, his mistake was her mistake. For a moment I felt some doubt as to whether it might not be possible to extend the doctrine of fraud so as to include this mistake. But I am afraid there is no authority to make such an extension. There is, of course, a distinction between fraud and anything else; and taking

the view of Lord Hannen, which I have just referred to, it seems to me that where there is the interposition of fraud between the principal and agent, it may be, to follow out Lord Hannen's view, that the agency is thereby rendered invalid, and that the person is not bound by the act of the agent. Under those circumstances, I feel bound to say that I am unable to strike these words out of the will, and probate will go of the will of October 17, 1889, with these words of revocation included. The will of 1875, with the codicil of 1885, will not be admitted to probate. The costs of all parties out of the estate.

C. Form.

LEMAYNE v. STANLEY.

COMMON PLEAS. 1681.

[Reported 3 Lev. 1.]

In ejectment upon *Not guilty*, and a special verdict, the case was: Stanley seised in fee writ his will with his own hand; beginning, "In the name of God, Amen, I John Stanley make this my last will and testament," and thereby devised the lands in question, and put to his seal, but did not subscribe his name, only had it subscribed by three witnesses in his presence; and all this was done after 29 Car. 2, against Frauds and Perjuries; and whether this was a good will to pass the lands, was the question. And after several arguments it was adjudged by the whole court, *sc.* NORTH, WYNDHAM, CHARLTON, and LEVINZ, to be a good will; for being written by himself, and his name in the will, it is a sufficient signing within the Statute, which does not appoint where the will shall be signed, in the *top*, *bottom*, or *margin*, and therefore a *signing* in any part is sufficient. And *per* NORTH, WYNDHAM, and CHARLTON, the putting of his seal had of itself been a sufficient *signing* within the Statute; for *signum* is no more than a *mark*, and sealing is a sufficient *mark* that this is his will; but LEVINZ doubted of this upon the case in Roll. 1 Abridgm. 245, § 25. Submission to an award *ita quod* it be made, *signed*, and delivered, the arbitrator makes an award, and delivers it, but does not *sign* it: *Et per Cur'*. It is not good;¹ but all agreeing upon the other reason, judgment was accordingly given for the defendant.²

¹ "It was said by LORD CHIEF BARON PARKER, BARON CLIVE, and BARON SMYTHE (*absente* LEGG), that what is said by North, Windham, and Charlton, in 8

² *Adams v. Field*, 21 Vt. 256 (1849), *accord*. And see, before the Statute of Frauds, *Brown v. Sackville*, Dyer, 72 a (1552).

On signing at the "foot or end," see St. 7 Wm. IV. & 1 Vict. c. 26, § 9 (1837); St. 15 & 16 Vict. c. 24 (1852); 1 Woerner, Amer. Law Adm. (2d ed.) § 39; *Matter of Conway*, 124 N. Y. 455 (1891); *Matter of Andrews*, 182 N. Y. 1 (1900); *Morrow's Estate* (No. 1), 204 Pa. 479 (1903).

JENKINS v. GAISFORD.

COURT OF PROBATE. 1863.

[Reported 3 Sw. & Tr. 93.]

JOHN JENKINS, late of Botley Hall, in the county of Southampton, Esq., died on the 22d of November, 1862, leaving a will, duly executed on the 14th of April, 1862, whereby he appointed his sister, Jane Gaisford, and his brother, Henry Jenkins, executrix and executor. There were two codicils, dated respectively the 5th of November, 1862, and the 6th of November, 1862, and an affidavit made by Henry Atkins stated the manner in which they had been executed.

Henry Atkins deposed as follows: "That I have for one year and upwards during the lifetime of the said John Jenkins, and up to the time of his death on the 22d of November last, acted as amanuensis to the said John Jenkins, who had for a considerable time past much difficulty in writing or signing his name; that the said John Jenkins, some months previously to his death, had an engraving made of his usual signature in order that the same might be used to stamp or impress his signature to letters and other documents, and that in his presence I have been in the habit of affixing to letters and other documents and papers the name of the said John Jenkins by means of the said stamp or engraving; that I am one of the subscribing witnesses to the first codicil to the will of the said John Jenkins, now produced and shown to me, the said codicil being written at the foot of the said will, and bearing date the 5th of November, 1862; that the said codicil was executed by the said testator on the day of the date thereof by my affixing or impressing the signature of the said John Jenkins, in compliance with his express orders and direction, at the foot or end thereof by means of the said stamp or engraving as the same now appears thereon, in the presence of the said John Jenkins and of Ann Budd, the other subscribing witness thereto, both of us being present at the same time, and that the said testator, after his signature had been affixed to the said codicil as aforesaid, placed his hand on the said codicil and acknowledged the signature as his own, and the said codicil to be a codicil to his last will, and requested me to attest the same, and I and the said Ann Budd thereupon attested and subscribed the said codicil in the presence of the said testator and of each other." The

Lev. 1, 'That putting a seal to a will is a sufficient signing within the Statute of Frauds and Perjuries,' is very strange doctrine; for that if it was so it would be very easy for one person to forge any man's will, by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And the barons said if the same thing should come in question again, they should not hold that sealing a will only, was a sufficient signing within the Statute. *Smith v. Evans*, 1 Wils. 313 (1751).

deponent then gave a similar description of the manner in which the testator's signature had been stamped upon the second codicil.

Dr. Spinks moved for probate of the will and two codicils.

SIR C. CRESSWELL refused to grant probate of the codicils on motion.

Henry Jenkins, the executor named in the will, thereupon propounded the will in a special declaration containing a statement of the above facts, and cited Mrs. Gaisford and Mrs. Thring, the sisters, and with himself the only next of kin, of the deceased. An appearance was given on behalf of Mrs. Gaisford, and a demurrer to the declaration filed and joinder in demurrer; but before the demurrer came on for argument Mrs. Gaisford died, and Mrs. Thring declined to take any steps in the matter.

Spinks, ex parte.

Cur. adv. vult.

SIR C. CRESSWELL. I am of opinion that the codicils were duly executed so as to comply with the 1 Vict. c. 26, § 9. It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word "signed" in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, and therefore a mark made by some other person under such circumstances must suffice. Now, whether the mark is made by a pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a fac-simile of the whole name was impressed on the will instead of a mere mark or X. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were not affixed by way of a signature.¹

HUNT v. HUNT.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1828.

[*Reported 4 N. H. 434.*]

THIS was an appeal from a decree of the judge of probate, in this county, allowing a certain instrument as the last will and testament of Arad Hunt, deceased. The said instrument was as follows:—

"\$1,000.

BRATTLEBORO', April 28, 1813.

"For value received, I promised to pay Arad Hunt, or his order, one thousand dollars, within one year from this date, and interest.

"LUTHER WELD.

"Attest: JONATHAN HUNT."

¹ But see *Goods of Emerson*, 9 L. R. Ir. 443 (1882).

There were upon the note the following indorsements :—

“ March 21, 1814, received one year’s interest. September 14, 1814, received forty dollars. November 1, 1814, received two hundred and four dollars. May 22, 1818, received thirteen dollars and six cents.”

“ If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt, 2d.

Witness : ARAD HUNT.”

The testator died in February, 1825.

The appellant filed in the court below, the following, as the reasons for claiming the appeal.

1st, That the said instrument, as presented, has not any of the formalities of a last will, as prescribed by the Statute of July 2, 1822. There is no seal affixed to the signature of the said Arad Hunt, the supposed testator.

2d, That said instrument does not appear to have been executed in the presence of any witnesses.

3d, That it does not, on the face of it, purport to be a testamentary disposition of the note, but a mere gift, which could only be perfected by a delivery of the instrument.

4th, That the instrument was found among the papers of the deceased, and that no person was thereby appointed or requested to execute it, which must show that the deceased did not intend to declare that as his last will.

5th, That the said Arad never intended the same as a will.

6th, That the same, if ever intended as a will, was revoked by the said Arad before his decease.

7th, That the said note was made in the State of Vermont, and the maker has always resided in that State, having no property in this State.

8th, That administration of all the estate of said Arad, deceased, within the jurisdiction of said judge of probate, for the county of Cheshire has, long since, been granted by said judge, and is still in force.

H. Hubbard, for the appellant.

Handerson, for the appellee.

By THE COURT. It is not disputed, in this case, that the deceased signed the writing which is offered for probate. There is no evidence, that he ever abandoned the original intention with which he made the writing. But it is objected, that the writing is not in its nature testamentary. We think, however, that the authorities adduced by the appellee’s counsel are decisive, to show that the writing is testamentary, and as such, entitled to probate. *Lovell on Wills*, 160; *Wentworth’s Office of Ex’rs*, 261; *Godolphin*, 67; 3 *Vesey & Beame*, 54, *Akerman v. Burrows*.

*Decree of the court below affirmed.*¹

¹ See *Castle v. Torre*, 2 Moore, P. C. 133 (1837); *Fosselman v. Elder*, 98 Pa. 159 (1881); *Byers v. Hoppe*, 61 Md. 206 (1884); *Coulter v. Sheldadine*, 204 Pa. 120 (1902).

D. *Incorporation by Reference.*

NOTE. — The power of a testator to incorporate writings into his will by reference is a subject so closely connected with the power of a testator to make provisions in his will which are dependent on his own future acts that some cases on this latter subject are included in this subdivision.

HANNIS v. PACKER.

CHANCERY. 1752.

[*Reported Ambl.* 556.]

MARY MEREDITH, being entitled to a real and personal estate, duly made her will 29th January, 1727, and devised to her sisters all the rest and residue of her real and personal estate, *after payment of her debts and legacies*, and made them executrices.

The testator some time afterwards made a codicil, and gave plaintiff a legacy in the words following: "This I desire may be performed by my loving sisters, to give £200 to my cousin Edward Hannis." But this codicil was not executed in the presence of any witnesses.

The question made was, Whether the £200 legacy, given by the codicil, was a charge upon the real estate. These cases were cited on the part of the plaintiff: *Masters v. Masters*, 1 Wms. 421; *Brudenell v. Boughton*, 6th March, 1741; *Lord Inchiquin v. Obrien*.

LORD HARDWICKE, CHANCELLOR. When a real estate is duly devised to trustees, and is well charged, by a will duly executed, with debts and legacies, debts which are contracted after making the will, or legacies given by a codicil, though not duly executed, will be a charge upon the real estate; for the real estate was well charged by the will with the debts and legacies; and it is immaterial by what instrument they appear, provided such instrument has been proved as part of the will; and when that is done, it is sufficient to denote the trust, and that it is part of what was intended to be comprised.

In those of the United States which have adopted provisions concerning nuncupative wills similar to those in § 19 of the Statute of Frauds, "In the time of the last sickness" has generally been construed "*in extremis*." See *Prince v. Hazleton*, 20 Johns. 502 (N. Y. 1822); *Yarnall's Will*, 4 Rawle, 46, 65 (Pa. 1833); *Boyer v. Frick*, 4 W. & S. 357 (Pa. 1842); *Werkheiser v. Werkheiser*, 6 W. & S. 184 (Pa. 1848); *O'Neill v. Smith*, 33 Md. 569 (1871); *Carroll v. Bonham*, 42 N. J. Eq. 625 (1887); *Rutt's Estate*, 200 Pa. 549 (1901).

Contra, see *Johnston v. Glasscock*, 2 Ala. 218 (1841); *Nolan v. Gardner*, 7 Heisk. 215 (Tenn. 1872); *Harrington v. Stees*, 82 Ill. 60 (1876).

Cf. 1 Woerner, Amer. Law Adm. (2d ed.) §§ 44, 45.

ROSE v. CUNYNGHAME.

CHANCERY. 1805.

[Reported 12 Ves. 29.]¹

ROBERT UDNY by his will, dated June 1, 1801, and duly executed according to the Statute of Frauds, devised to trustees all his real and personal estate in the island of Grenada upon trust by and out of the produce of said real and personal estate to pay off and discharge all debts and encumbrances, to which the said estates should be liable at his decease; and also to pay off and discharge all such annuities, legacies, or bequests, as he should give or bequeath to be paid out of and from, or charge and make chargeable upon, his real or personal estate in the said island of Grenada by his will or by any codicil or codicils thereto or by any writing or writings at any time or times hereafter, signed by him, or in his own handwriting, whether witnessed or not; and after payment and satisfaction of the said debts and other encumbrances, annuities, legacies, and bequests, as aforesaid, upon certain other trusts.

By a subsequent clause the testator declared that he charged his estates in Grenada with the payment of an annuity of £200 to his wife.

The testator made several codicils to his will, all of which were written by himself and signed but not attested. One of the codicils was as follows: "By this further codicil to my will and other codicils dated this 27th day of August, 1701 [*sic*], I leave my dear wife, that she may suffer no inconveniency from the change of her situation, an additional £100 *per annum* from my Grenada estate on the same terms of the former £200 to be paid to her by my executors, being in all £300."

Under the bill of the trustees a decree was made, among other things, directing an inquiry, what encumbrances affect the estate in Grenada. An exception was taken to the Master's report for not stating the annuity of £100, given to the wife by the codicil.

Mr. Richards and *Mr. Thomson*, in support of the exception.

Mr. Romilly and *Mr. Cullen*, for the report.

June 27. THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] I shall give no final opinion at present. But this case is materially different from any that have been hitherto decided; for the charge is of a very peculiar nature; not of all legacies he shall afterwards give; but of all such legacies as he shall afterwards charge upon the estate, or make payable out of it. Suppose he had given a general legacy by his will; that would not be charged upon this estate: nor a general legacy by a codicil. For that purpose the legatee must show that his legacy was made chargeable upon, or payable out of, the Grenada estate. That seems in effect a reservation by a will, duly executed, of a power to charge the Grenada estate by a will, not duly attested. When a

¹ The statement of this case is abbreviated from the report.

man by a will, duly executed, charges all legacies generally, expressing his resolution that whenever he gives them, they shall be a charge, it is determined, that whenever given, they shall be a charge. But according to this it is not in the duly attested will alone that you find the charge: but the intention to make it a charge may be in the unattested instrument, the codicil. This is a new case; nearer to *Huberg-ham v. Vincent*, 2 Ves. Jr. 204, than any other; where by a will, duly attested, the testator seemed to reserve to himself a power to dispose by a deed.

August 7. I stated my impression as to this case before; and regret, that further consideration has not induced me to alter that impression; as the consequence is, that the widow is deprived of a part of that provision which was obviously intended for her. The ground upon which it is contended, that this additional annuity of £100 might be good as a charge upon the Grenada estate, is, that the estate being once charged with all legacies and annuities, the testator may afterwards give either legacies or annuities by an unattested codicil; that the rule is so settled in many cases; and, if this were that case, unquestionably it is too well established to be now disturbed; though it may be doubted whether it is perfectly consistent with the Statute of Frauds (Stat. 29 Ch. II. c. 3); for in effect the testator does dispose of his land by an unattested codicil, when he is at liberty to burden it with legacies so given. However in this case the testator does not charge the Grenada estate with legacies or annuities generally; but with such only as he shall afterwards give, and charge upon that estate: so that, as legacy or annuity, it is not at all chargeable upon the estate: but it is, as he has thought fit by an unattested codicil to declare, that it shall be a charge upon the estate. The reason, that debts and legacies may be a burden upon the estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain what debts a man may owe at the time of his death: and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him, to give. The court has therefore said, that when he has by a will, duly executed, charged debts and legacies, it is only necessary to show that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shown to belong to the demand, you show that it is already charged upon the estate. Then, an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it that it is a legacy; and then the charge immediately attaches by virtue of the executed will. But here the testator says, he does not now determine that all annuities and all legacies he shall hereafter give shall be charges; but only, that if at some future period he shall think proper to declare legacies and annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found; but also the will of the testator to make it a

charge upon this estate; without which it is not a charge. This is only an attempt to reserve by a will, duly executed, a power to charge by a will not duly executed. It is the case of *Habergham v. Vincent*. It might as well have been contended in that instance, that there was an adoption into the will of that future instrument: but the opinion of the Lord Chancellor and the judges was, that it was not competent to a man to give himself such a power; viz. a power to dispose of land by an unattested instrument. That is the reservation this testator attempts to make; for, unless he thinks fit, when he makes his codicil, to declare his intention that his land shall be charged with the legacy or annuity, it shall not be charged. Then it is through the medium of an unattested instrument that it is to be a charge upon land; and that cannot be within that case. The Master is therefore right in reporting, that this annuity of £100 is not a charge upon the Grenada estate; and the exception must be overruled.

STUBBS v. SARGON.

CHANCERY. 1838.

[*Reported 3 Myl. & C. 507.*]

THE LORD CHANCELLOR. [LORD COTTENHAM.]¹ The second question is, Whether the ultimate devise of the premises in Little Queen Street be void, either under the Statute of Frauds, or for uncertainty. The earnestness with which the point was pressed at the bar by very eminent and learned counsel, has induced me to devote more consideration to the subject than I should have thought necessary from any difficulty I have felt upon the point itself. The devise is to trustees to keep in repair the premises, and, subject thereto, to pay the rents to the testatrix's sister, Mary Innell, during her life, and after her decease, in trust to dispose of and divide the same unto and amongst her partners who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees should think fit and deem advisable.

She gave her stock in trade to her executors to sell, but with liberty for her partners, or the persons who should be entitled to her freehold premises under her will, to purchase the same at a valuation.

She gave the residue of her personal estate amongst certain of her nephews and nieces; but provided that such of her nephews as should be entitled to any beneficial interest in her freehold premises under her will, should have only one half of the shares of the others.

¹ Only the opinion is given, and of that the portions relating to other points are omitted.

Upon the first head of objection, namely, the Statute of Frauds, it was argued that the will contained no disposition of itself, but that it was a reservation to the testatrix of the power of completing the devise by investing the intended devisee with the character described in the will, and that *Habergham v. Vincent*, 2 Ves. Jr. 204; 4 Bro. C. C. 353, was in point in support of that proposition. The difference between the two cases is, that the will in *Habergham v. Vincent* contained no devise of the remainder; it only declared that the remainder should be for such persons and for such estates as the testator should, by any deed or instrument attested by two witnesses, appoint. This was no disposition of the property; but a reservation by will, inoperative till the testator's death, of a power to dispose, in his lifetime, of freehold property, by an instrument not attested according to the Statute of Frauds.

In the present case, the disposition is complete. The devisee, indeed, is to be ascertained by a description contained in the will; but such is the case with many unquestionable devises. A devise to a second or third son, perhaps unborn at the time — many contingent devises — all shifting clauses — are instances of devises to devisees who are to be ascertained by future events and contingencies; but such persons may be ascertained, not only by future natural events and contingencies, but by acts of third persons. Suppose a father, having two sons, and having a relation who has a power of appointing an estate to some one of them, makes his will, and gives his own estate to such one of his sons as shall not be the appointee of the other estate — or with a shifting clause. Here the act of the donee of the power is to decide who shall take the father's estate; but there is nothing in the Statute of Frauds to prevent this, because the devise by the will is complete, that is, the disposition is complete — the intention is fully declared, though the object to take remains uncertain. If the subsequent act removing that uncertainty, and fixing the identity of the devisee, were to be considered as testamentary, in the case above supposed, the donee of the power would be making or completing the will of the father, that is, one man would be making another man's will. The act, therefore, is not testamentary; and, if not, then why should not the act be the act of the testator himself? It is objected to upon the ground of its being testamentary; but if it be not testamentary when done by a stranger, it cannot be so when done by the testator. If it were otherwise, a testator could not devise lands, or give legacies charged upon land, to such person as might be his wife at his death — to such children as he might have — or to such servant as he might have in his service at his death. The cases of charging legacies generally by a will, and naming legatees by an unattested instrument, carry this principle to the greatest length, because the subsequent act ascertaining the party to take is also testamentary; but that rule is recognized by Lord Rosslyn in *Habergham v. Vincent*; and Sir W. Grant, in *Rose v. Cunynghame*, 12 Ves. 29, — see page 38, — explains it upon the principle I have adverted to. He

says the will creates the charge; it is only necessary to show that there is a legacy; for the moment that character is shown to belong to the demand, you show that it is already charged upon the land: and his decision in that case marked the distinction, for the testator did not charge his legacies by his will, and name the legatee by a codicil; but he devised his estate to pay such legacies as he should bequeath to be paid out of his estate; and afterwards, by an unattested codicil, attempted to charge a legacy upon the estate; which Sir W. Grant held he could not do, because, not only is the legatee to be found in the codicil, but the will to make the charge—that not being to be found in the will. I think, therefore, the objection upon the ground of the Statute of Frauds cannot be supported.

Then as to the uncertainty, I think the facts stated in the Master's report, clearly bring the parties within the description in the will. The testatrix, being desirous of herself retiring from business, and having nephews and nieces, some of whom had been her partners, gives up the business to four, some of whom had been her partners, and others whom she then introduced, and gives to the four stock in trade to the amount of £1,000; and, by circulars, introduces to her former connection these four persons, whom she calls her successors. These certainly are persons to whom she had disposed of her business within the meaning of the will.

Sir C. Wetherell and *Mr. Wakefield*, for the heiress-at-law.

Mr. Spence and *Mr. Walker*, *Mr. Tinney* and *Mr. Richards*, *Mr. Knight Bruce*, *Mr. Parker*, *Mr. Teed*, *Mr. Rogers*, *Mr. Bethell*, and *Mr. Hill*, for other parties.

ALLEN v. MADDOCK.

PRIVY COUNCIL. 1858.

[*Reported 11 Moo. P. C. 427.*]

THEIR Lordships' judgment was delivered by the RIGHT HON. T. PEMBERTON LEIGH.¹

On the 1st of December, 1851, Anne, the wife of Joseph Emanuel Allen, but who was separated from her husband, and who had assumed, and was known by, the name of "Foote," drew up in her own handwriting, and signed and sealed, a paper of that date, described in its commencement as the "last will and testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property.

¹ Present: THE RIGHT HON. DR. LUSHINGTON, the RIGHT HON. T. PEMBERTON LEIGH, the RIGHT HON. SIR EDWARD RYAN, and the RIGHT HON. SIR CRESSWELL CRESSWELL. Only the opinion is given.

She had a power, under the settlement made on her marriage, to make a will, but the paper in question was attested by only one witness, and was, therefore, not valid.

On the 13th of September, 1856, being then on her death-bed, she duly executed a codicil, thus headed: "This is a codicil to my last will and testament." By this codicil, she gives to her servant, Eliza Baker, the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a sitting-room and a bed-room." The codicil appoints no executor, and contains no other reference to the will.

On the following day, the 14th of September, the testatrix died. On her death, search was made for her testamentary papers by Sir Thomas Herbert Maddock, who was one of the executors appointed by the paper described as her will, and to whom, in pursuance of the testatrix's direction, a letter announcing the event had been sent immediately upon her death. The codicil was found in a chest in her bed-room, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bed-room into an adjoining room. This paper was enclosed in a sealed envelope, on which are written the words, "Mrs. Anne Foote's will."

No other testamentary paper of any description was found.

Under these circumstances, these two papers have been admitted to probate by the judge of the Prerogative Court; and against this decree the present appeal is brought as regards the will.

The objection relied on is, that there is no such distinct reference to this paper in the codicil, as to enable the court to receive parol evidence in order to identify it; that it is not identified by the description of a "will," for that, in truth, it is not a will; that it is not identified either by date or by any reference to its contents, or by annexation to the codicil, so as to distinguish it from other papers of a like description, if more than one were found; and that to admit this paper to probate on the ground that no other is produced to satisfy the description, would be to incorporate the will in the codicil, merely by parol evidence, and not by the effect of the reference contained in the codicil itself.

It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject.

Before the "Act for the Amendment of the Laws with respect to Wills," 7 Will. IV. and 1 Vict., c. 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a will or codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal courts, with respect to the disposition of real estate; and the Statute alluded to having placed wills, as to real and personal property, on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the Statute, in the courts of law, are now equally applicable to the Court of Probate, with

regard to personality. In considering them, however, it is necessary to bear in mind this distinction between cases before the Statute, and subsequent cases, namely, that, before the Statute, a testamentary paper not executed so as to affect real estate, was valid as to personality; was really a will or codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the Statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil.

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the testator by word, or in writing, and other testimony of a similar character, are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his will, the court is entitled, and is bound, to place itself in the situation of the testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the will, and for this purpose to receive, if occasion require it, parol evidence of those circumstances, and to expound his meaning with reference to them.

In the celebrated treatise of Sir James Wigram, cited at the bar, these rules are stated, discussed, and explained in a manner which has excited the admiration of every judge who has had to consult it. After collecting and stating the effect of the several authorities, Sir James Wigram sums up (as it appears to us with perfect accuracy) the result in these terms: "Every claimant under a will has a right to require that a court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare. It follows that — with the light which that situation alone affords — the testator's meaning can be determined by a court; the court which so determines does, in effect, declare that the testator has expressed his intention with certainty, or, in other words, that his will is free from ambiguity." (Prop. v. par. 96.)

It may be said that, on the present occasion, the Court of Probate is, to a certain extent, a court of construction; for it has to determine what is the meaning of the reference made by the testatrix in her codicil, to her last will and testament (the executor under which is to determine upon one of the gifts in the codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to.

This question is one of fact which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testatrix's death any such instrument as is referred to by the codicil. For this purpose.

Inquiry must be made and evidence must be offered to show what papers there were at the date of the codicil, which could answer the description contained in the codicil; and the court having by these means placed itself in the situation of the testatrix, and acquired, as far as possible, all the knowledge which the testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the codicil; yet it must, in that case, have been proved, or assumed, that there was no later will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper.

That a description in a will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. "If the description in the will is incorrect, evidence, that a subject — having such and such marks upon it — exists, must be admissible, that the court may determine whether such subject, though incorrectly described in the will, be that which the testator intended." (Wigram's "Extrinsic Evidence in Aid of the Interpretation of Wills," Prop. v. par. 64.)

Is, then, the evidence in this case sufficient to identify the paper propounded as the will? No other paper has been found to which the description can apply; here is a paper kept by the testatrix up to the time of her death in her own possession, to which, according to her view of that paper, it does apply with the strictest accuracy.

If we are to read the codicil with the knowledge of what the testatrix knew, namely, that she had this testamentary paper, and that she had no other, can it be doubted that this is the paper referred to?

It is said, however, that this is merely the effect of parol evidence; and that there may be other wills, and that if there were two there is nothing in this codicil to distinguish which was the will referred to. Unless there were two, both imperfectly executed, and both of the same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every will, as a last will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the will is made on the death-bed; sometimes open to great doubt, as when the will has been made many years before the death; but in every case the court admitting the instrument to probate, must be satisfied that it is the last will.

Supposing the paper propounded as a will in this case had been executed a few hours before the codicil, and that there was positive proof that the testatrix signed no other paper till she signed the codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the codicil had identified the paper, by describing it as containing certain bequests, such reference would

have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that there was no later will which contained similar bequests.

No doubt the rule of law is as stated by Lord Eldon in *Smart v. Prujean*, 6 Ves. 565, that "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded.

In the case of *Smart v. Prujean*, the testator by his will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his will that he intended to leave with the abbess of a convent named, or her successor, appoint. This will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written, or one which he intended to write. In point of fact the testator never deposited any letter in the custody mentioned in his will, but at his death two papers were found in an envelope, which enclosed also his will, one being a letter addressed to his executors, and another a letter addressed to the abbess in question, both documents bearing date some months before his will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in terms, referred to a will already made, and could hardly be construed to refer to the will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the abbess, which Lord Eldon thought, by the terms of the will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently existing, and clearly and undeniably referred to, could be made part of the will, *Wilkinson v. Adam*, 1 Ves. & Bea. 445; but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a will might be incorporated in it.

A reference by a testator to his last will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to codicils, of which there may be several.

In the numerous cases to be found on the subject of republication of a will by a codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the codicil should refer to the particular paper containing the will, so as to distinguish it from all other wills.

In *Barnes v. Crowe*, 1 Ves. Jr. 497, Lord Commissioner Eyre observes: "The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three." It was decided in that case, that the republication of a will by a codicil was not only a recognition of the will, but had the effect of a re-execution, so as to make it speak as from the date of the codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir William Grant, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes v. Crowe*, in the case of *Pigott v. Waller*, 7 Ves. 118, he urged very strong reasons against the principle of that decision; but that a codicil to a will, though not referring to it, recognizes a preceding will, and amounts to a republication, he does not intimate any doubt. His words are: "A direct republication, or re-execution, is an unequivocal act, making the will operate precisely as if it was executed on the day of the republication. But a reference to the will proves only, that the deviser recognizes the existence of the will; which the act of making a codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He afterwards observes, page 120: The Lords Commissioners, in *Barnes v. Crowe*, appear to have determined "that every codicil, duly attested, ought to be held a republication. Their opinion seems to be, that the codicil was incorporated with the will. The general proposition referred to by Lord Commissioner Eyre, is, that the execution of a codicil should in all cases be an implied republication."

In the case of *Doe d. Williams v. Evans*, 1 Crompt. & Mees. 42, a testator prepared a will which he did not sign, and about a fortnight afterwards duly executed a codicil on the same sheet of paper, commencing with these words: "Codicil. — I, David Evans, make a codicil to the foregoing will;" and it was held that the codicil operated to incorporate and establish the will. Mr. Baron Bayley in giving judgment, observes, "The will was written on part of a sheet of foolscap paper, and the codicil was written on the same sheet. Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up. The language is, 'Codicil —

I, David Evans, make a codicil,' which word implies an addition to a former instrument. It proceeds, 'a codicil to the foregoing will;'" and the learned judge then observes, "The testator, by executing this codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the codicil, but the will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in the case of *Guest v. Willasey*, 2 Bingh. 429; s. c. 3 Bingh. 614, this circumstance was wanting. A testator there made his will, duly attested. On the back of this will he wrote three codicils, two unattested, and the last attested. The last codicil revoked the appointment of an executor made by the second codicil, but did not otherwise refer either to the will or codicil. The court was of opinion that the last codicil operated as a republication, not only of the will and of the second codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification — it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

In the case of *Gordon v. Lord Reay*, 5 Sim. 274, a testator made his will, dated the 17th of August, 1812, duly executed and attested, by which he devised £10,000 to the plaintiff, charged on certain estates. He afterwards made a codicil, unattested, dated the 8th of April, 1814, by which, after reciting that he had sold the estates so charged, he directed that the legacies should be paid out of and charged on his other real estates. On the 13th of August, 1818, he made a second codicil, duly executed and attested, by which he confirmed the provisions made by his will of the 17th of August, 1812, in favor of the plaintiff, but took no notice of the codicil of the 8th of April, 1814; yet it was held, that a codicil being in law a part of a will, the second codicil, by confirming the will, established the first codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent case of *Utterton v. Robins*, 1 Ad. & Ell. 423, which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the testator made a will, dated the 12th of September, 1823, duly executed and attested, and after devising a house in Brompton Terrace to his daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his will, dated the 6th of August, 1825, signed, but not attested, the testator recited that he had sold the house given by the will to his daughter, and gave her instead of it a house in Portugal Street. He afterwards signed

another unattested codicil, dated the 29th of August, 1825, to the same effect, and afterwards made several codicils properly executed and attested, for the purpose of including in the operation of his will, after-purchased estates. The last of these codicils was dated the 5th of February, 1830, and was in these words: "I, John Robins, do make this further codicil to my will, which bears date the 12th day of September, 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said will expressed and declared of and concerning the residue of my real estates."

The house in Portugal Street had been purchased between the date of the will and of the codicil of the 29th of August, 1825, and the question for the consideration of the court was, to whom the house in Portugal Street passed; it being contended on the part of Mrs. Utterton, that the last codicil, though not referring to any instrument but the will, operated as a republication of all the codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. The case of *Gordon v. Lord Reay* was not cited, and the court did not decide whether such codicil would or would not establish the unattested codicils not referred to; though Mr. Baron Parke may be considered to have intimated an opinion against giving to the codicil what he terms "that immense effect in republication which Mrs. Utterton's counsel ascribe to it;" but the court held, that supposing the codicils in favor of Mrs. Utterton to have been duly attested, the last codicil would have revoked them, and devised the estate in question to the trustees under the will. The learned judges had no doubt that any testamentary paper unattested, sufficiently referred to [in] a duly executed and attested codicil, would be established by such codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn v. Jervis*, 3 Beav. 450, decided by Lord Langdale; the cases of *Guest v. Willasey*, *Gordon v. Lord Reay*, and *Utterton v. Robins*, were all cited; and his Lordship was of opinion, that a codicil duly executed and attested, though referring only to the will, operated to establish and republish all previous codicils, whether duly executed or not.

The testator there made a will giving various legacies, and charging his real estates with all legacies thereby given. He made many codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh codicil was duly executed and attested, and began in these words: "This is a further codicil to the last will and testament of me, Sir Thomas Clarges,

Bart., made this 10th day of April, 1828." The codicil was confined to revoking the appointment of two gentlemen named in the will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord Langdale held, that the legacy to Brundrett was not charged on the real estates, because the codicil did not so charge it, and the will charged only the legacies thereby given; but he was clearly of opinion, that the last codicil operated as a republication of all the preceding codicils, as well as of the will, though none of the codicils were referred to. His language is: "The object of the last codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the will and former codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last codicil, and have subjected such subsequently acquired lands to a general charge contained in the will; yet, considering it as a republication of the will and all the preceding codicils, I do not think the effect is to charge on the land, legacies which by those codicils were not so charged."

Aaron v. Aaron, 3 De Gex & Sm. 475, before Lord Justice Knight Bruce, recognizes the rule of law as established in *Gordon v. Lord Reay*, and treats it as not inconsistent with the decision in *Utterton v. Robins*; and his Lordship observes "that it can make no difference whether the codicil be written on the same paper with the will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the court to identify the document; that a codicil would operate as a republication of the will, and that a republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil.

This doctrine was very much discussed in the case of *Hitchings v. Wood*, before the Judicial Committee in 1841, reported in 2 Moore's P. C. Cases, 355; and many valuable observations bearing upon this question were made by Lord Lyndhurst, though, as the case arose before the Wills Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any other instrument. In either case it is necessary, and it is sufficient, that the description should

be such as to enable the court, when the evidence is produced, to say what is the instrument intended.

In the case of *Shortrede v. Cheek*, 1 Ad. & Ell. 57, a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the court was, that, although if there had been more than one, there would have been difficulty in admitting parol evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. Mr. Baron Parke observed, in answer to the argument that there might be other notes, "Even if the note had been fully described, you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by Lord Lyndhurst in the case of *Hodges v. Horsfall*, 1 Russ. & Myl. 116. A contract in writing was made, one of the terms of which related to the execution of certain buildings, "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. Lord Lyndhurst, in a bill for a specific performance of the contract, held, on the authority of *Clinan v. Cook*, 1 Sch. & Lef. 22, that parol evidence was admissible to prove which of the plans was intended, but he thought that the evidence was insufficient to identify the one insisted on, and on that ground dismissed the bill.

It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination of the opinion, of the judges in *Shortrede v. Cheek* (Wigram's "Extrinsic Evidence in aid of the Interpretation of Wills," Prop. vii. par. 165, p. 127, in note).

For the present purpose it is quite immaterial to consider the value of these objections. In this case it is clear, that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description.

The cases of *Shortrede v. Cheek*, and *Hodges v. Horsfall*, are referred to by Lord Cottenham, in *Squire v. Campbell*, 1 Myl. & Cr. 480, as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document, the identity of the thing referred to may be established by parol evidence.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there

is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837 altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devises of lands shall be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7th Will. IV., and 1 Vict. § 9, provides, that no will shall be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the new Act.

In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act.

The incorporation of unattested documents by reference in an attested will, was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

The only circumstance of which we are aware from which any color can be given to the argument that the Statute had the operation now suggested, is the construction put upon it by this committee, in *Smee v. Bryer*, 6 Moore's P. C. Cases, 404, by which it was held that the signature must be so affixed at the end of the will as to leave no blank space for any interpolation between the end of the will and the signa-

ture; and it might be said that such a security against fraud could not be afforded if a paper only referred to in the will could be admitted as part of it. But this construction was found to produce such extensive injustice that, by the Statute, 15th & 16th Vict. c. 24, the Legislature interfered to alter the law so established, and this Act passed before the codicil in this case was executed. It was not contended in this case, nor, as far as we are aware, has it been contended in any case since the Wills Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a will or codicil, but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.

Upon this point an important distinction has been introduced by the Act, to which we have already alluded, namely, that whereas before the Act a paper not duly executed might be a codicil as to personal estate, and might, therefore, be referred to by that description, no such paper can now be properly so designated.

That, with this exception, the law on this subject remains as it was before the Act, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found.

In April, 1841, the question now raised came before the Prerogative Court in *Smith's Case*, 2 Curt. 796. In that case the testator, in May, 1838, made a codicil to his will, signed but not attested. In August, 1840, he made a further codicil, signed and duly attested. This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament." Sir Herbert Jenner Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also."

In the case of the *Goods of Sotheron*, 2 Curt. 831, the same learned judge recognized the rule as laid down in *Smith's Case*, but held the reference in the will not to be sufficient to let in evidence of the paper propounded.

In January, 1843, in the case of *Claringbull*, 3 Notes of Cases, 1, Sir Herbert Jenner Fust again acted on the rule laid down in *Smith's Case*, referring to it as the interpretation which this court has put upon the Statute of Wills.

In the course of the same year he had to determine the important case of *Lord Hertford's Will*, 3 Curt. 468. The testator had there made a will and twenty-nine codicils. Some of the codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of which were attested, and others not. One codicil, made at Milan in October, 1838, was unattested. He made a further codicil dated in April, 1839, duly executed and attested, and thereby declared that he ratified and confirmed his will and codicils. The question was whether the Milan codicil was thereby established, and it was

decided by Sir Herbert Jenner Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the court could not, therefore, extend the words of reference to an instrument not answering the description.

In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of Sir Herbert Jenner Fust, and the decision was affirmed (4 Moore's P. C. Cases, 339). Dr. Lushington, in delivering the judgment of the Committee, observed very strongly upon the inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified; but he also relied on the ground of the judgment in the court below, namely, that there being no reference to the particular paper, except under a general description of "codicils," and there being instruments which properly answered the description of codicils, the words could not be extended to an instrument not properly answering the description.

This was the case mainly relied on by the appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, nothing in it inconsistent with the rule adopted in the cases of *Smith* and *Claringbull*, which applied under the new Act the principles adopted under the old.

The question came again before Sir Herbert Jenner Fust in the case of *Ingoldby v. Ingoldby*. 4 Notes of Cases, 493, in 1846. In that case, the testator made an unattested codicil to his will; he afterwards made a second, properly attested, with the words, "This is another codicil to my will." On his death, these two codicils only were found, and Sir Herbert Jenner Fust admitted them to probate. The learned judge observes: "I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's Case*. There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it is not duly executed; but it is clear that the testator intended it to be a codicil, not only from the paper itself, but from the indorsement; and it was attached to the will by sealing-wax, without a seal. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." The learned judge then adverts to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverts to it as a not immaterial circumstance, but does not make it the *ratio decidendi*.

The same question again came before the court in 1849, in the *Case of Phelps*, 6 Notes of Cases, 695. There the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir Herbert Jenner Fust held, that the first codicil was not established by the second, for the instrument in question was not a codicil; and, therefore, the confirmation of the will did not amount to a confirmation of the codicil.

In the case of *Haynes v. Hill*, 7 Notes of Cases, 256, the point once more arose in August, 1849. In that case, a testator made his will and several codicils, the last of which only was attested. The last codicil confirmed the will, but said nothing of the codicils. The question was in truth the same as had arisen in *Phelps's Case*, and the same decision was pronounced. Sir Herbert Jenner Fust went very fully into the doctrine, and held, as it seems on the most satisfactory grounds, that the case was governed by *Lord Hertford's*, there being no reference to anything but the will, and the unattested codicils not being part of it.

These cases, when compared with *Gordon v. Lord Reay*, clearly illustrate the distinction introduced by the Wills Act, to which we have already adverted.

In the *Case of the Countess Dowager of Pembroke*, 1 Deane's Ecc. Rep. 182, Sir John Dodson, from whose decision the present appeal is brought, followed the decision of Sir Herbert Jenner Fust in *Sotherton's Case*, but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.

The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made. The facts on which we rely are, beyond all question, admissible in evidence, namely, that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an indorsement describing it as her will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier will, which the testatrix destroyed.

Their Lordships, therefore, are of opinion, that the decree complained of must be affirmed, and they think that the costs of all parties must come out of the estate. They cannot properly refer to the extrajudicial opinion of any individual, however eminent, as an authority for their decision; but it is satisfactory to them to observe that (in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage) Lord St. Leonards treats as clear, a point which, from its extreme importance, their Lordships have thought it advisable to examine at so great a length. In the "Handy Book on Property Law" (sixth ed. 151), we find the following passage: "So a will or codicil not duly executed, may be rendered valid by a later codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your codicil, 'This is a codicil to my last will,' and there was only one will, those words would set up the will, although not duly executed." That very learned author then points out the distinction, where there are several wills and codicils, and refers to the decision in *Lord Hertford's Case*, which he understands as we do.

Sir Fitz-Roy Kelly, Q. C., and *Dr. Jenner*, for the appellant.
Dr. Phillimore and *Dr. Deane*, for the respondent.¹

GOODS OF ALMOSNINO.

COURT OF PROBATE. 1859.

[Reported 1 Sw. & Tr. 508.]

In this case the testatrix died on the 31st of December, 1858. On a table in her room was found an envelope, which had been sealed, but the seal was broken, directed to Mr. Azuelos, No. 62, Bishopsgate Street Without. Within this was another envelope, sealed and directed "For Mr. Azuelos, No. 62, Bishopsgate Street Without. I wish him to open this letter immediately I am dead, or, if he should not be in London at the time of my death, it must be delivered to Mr. S. Almosnino, No. 11, Bevis Marks, City."

On the inner envelope was also written, "I confirm the contents written in the enclosed document, in the presence of Richard Morse and Sarah Praeger, this 29th day of December, 1858.

"A. ALMOSNINO,

"RICHARD MORSE, 8, Charing Cross.

"SARAH PRAEGER, 25, Esher Street,
 Upper Kennington Lane."

¹ Cf. *Goods of Greves*, 1 Sw. & Tr. 250 (1858); *Goods of Dallow*, L. R. 1 P. & D. 189 (1866); *Singleton v. Tomlinson*, 3 Ap. Cas. 404 (1878). The case of *Goods of Sotherton*, 2 Curt. 831 (1841), must be considered as overruled.

Inside this envelope, when opened, was found a paper in the deceased's handwriting, commencing thus : —

“ MY DEAR NEPHEW, — You will be doing me a charity if you will comply with my last wishes ; I always found you very kind, and I hope you will not refuse my last request,” etc. The paper proceeded to give directions as to her funeral, and the disposition of her property ; it was signed by her, but not attested ; and mentioned no executor. From the affidavit of Judah Azuelos, it appeared that he was nephew of deceased's husband, and was in the habit of visiting the deceased, who had frequently mentioned to him a paper containing instructions to be attended to after her death, and addressed to him ; that on the 29th of December, 1858, he told her that such a paper ought to be signed by two witnesses, when the deceased sent for Morse, and signed the memorandum of confirmation written by Morse on the inside envelope ; that the paper writing and the addresses on the envelopes were in the deceased's handwriting ; that the seal on the inner envelope remained unbroken when the memorandum was written (the deceased objecting to have it opened), and that the same seal was found unbroken after her death when the inner envelope was cut open.

Richard Morse, at whose house the deceased lodged, deposed that he went into her room on the 29th of December, 1858, at Mr. Azuelos' request, and wrote the memorandum on the inner envelope, which was signed by the deceased in his presence, and that of Sarah Praeger, and that they then attested it ; he gave the same account of the condition of the envelopes and seals as Azuelos did, which was confirmed by S. Almosnino, who, after deceased's death, had cut open the inner envelope.

Mr. Dowdeswell moved the court to decree probate of the paper writing and of the inner envelope, as together containing the will of the deceased, to Judah Azuelos, as executor according to the tenor. Parol evidence is admissible for the purpose of showing that the paper writing was the document referred to by the memorandum.

SIR C. CRESSWELL. Is there any case in which a paper has been held to be incorporated, by reference, with one duly signed and attested, where there was no description whatever of the paper supposed to be referred to ? It seems to me to differ from most of the cases cited in *Allen v. Maddock*, 11 Moore, P. C. 427 ; the deceased does not call it a will or testamentary paper, or in any way describe it ; the words are simply, “ I confirm the contents written in the enclosed document.”

Cur. adv. vult.

SIR C. CRESSWELL. In this case application was made for probate of a paper under rather singular circumstances. The deceased wrote a paper giving directions for the disposition of her property after her decease, and apparently not wishing any one to know the contents, she enclosed it in an envelope on the outside of which, in consequence of a suggestion that any paper to be acted upon after her death ought to be

signed by two witnesses, was written, "I confirm the contents written in the enclosed document," etc.; this was duly signed by the deceased and attested by two witnesses. The question is, whether parol evidence can be received to identify the document purported to be confirmed, and, if so, whether the evidence of identity is sufficient? Where a duly executed paper contains a reference to another testamentary paper the court is at liberty, by parol evidence, to ascertain all the circumstances of the case, so as to place itself, as far as possible, in the situation of the testator, the meaning of whose language it is called upon to declare; for on such occasions the Court of Probate is to some extent a court of construction; but parol evidence is inadmissible to prove intention. In *Allen v. Maddock*, all the cases on this point were elaborately reviewed. Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum indorsed on the inner envelope. The parol evidence shows that the envelope was sealed in a particular manner, and that it was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and one only was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed.

Probate granted.

VAN STRAUBENZEE v. MONCK.

COURT OF PROBATE. 1862.

[*Reported 3 Sw. & Tr. 6.*]

THIS was an amicable suit, instituted under the direction of the court for the purpose of determining whether two paper-writings of a testamentary character had been incorporated in another paper-writing duly executed according to the Wills Act by the late Mary Elizabeth Monck, the wife of Sir Charles Miles L. Monck, of Belsay Castle, Northumberland, so as together to constitute her last will. It had been arranged that Mrs. Van Straubenzee should propound the papers as plaintiff in the suit, and that Sir Charles Monck should appear as defendant.

The personal property over which Lady Mary Monck had disposing power consisted of certain articles of paraphernalia, and she also had power, under her marriage-settlement, to appoint by will a sum of £5000 charged on her husband's estates, and to be raised and paid after his death.

The facts of the case, as proved by affidavit, were, that on the 6th of May, 1851, Fanny Brown, the housekeeper at Belsay Castle, was requested by Isabella Graham, now deceased, another servant at Belsay Castle, to accompany her to the room where Lady Mary Monck was sitting; that they accordingly went into the room and found her there

alone, sitting at her writing-table, upon which were several papers lying before her, but how many the said Fanny Brown did not recollect; that Lady Mary Monck took from amongst the said papers the said paper marked A, and signed it in the presence of Fanny Brown and Isabella Graham, and requested them to sign their names to it as witnesses, which they thereupon did in her presence, and in the presence of one another. The following is a copy of exhibit A:—

“It is my wish for my dear husband to administer to the money^s, the smaller bequests dear Laura will be so kind as to attend to.—
M. E. MONCK, May 16th, 1851. Fanny Brown. Isabella Graham.

“Some tapestry work of the Dowager Countess of Tankerville to be disposed of as Sir Charles may think fit, or kept by the family at Belsay.”

This last paragraph was not on the paper when signed by the witnesses. Immediately after the witnesses had subscribed their names, Lady Mary Monck took from among the papers lying on the writing-table two sheets of paper with writing on them (but Fanny Brown could not identify them), and enclosed them in the paper marked A, which she sealed with two seals. Some time after the year 1853, Lady Mary Monck gave to her husband exhibit A, sealed with two seals, impressed with the letter M, to deposit in the strong-room. This paper parcel was opened after her death, and was found to contain two pieces of paper, marked exhibits B and C. They commenced as follows:

“BELSAT, May 11, 1851.

“Of the £5000 in my power to leave, I bequeath to dear Harriet Straubenzee, to be settled on my god-daughter Mary Straubenzee, £1000; £2000 to Louisa and Alicia Hammond. £1000 each; £500 to Maria and Mary Wrottesley. £250 each; £1000 to Gertrude Gorges, to be settled on her son Arthur.”

Then followed a great number of bequests of articles of jewelry and pictures to various persons, including the bequest of turquoise and gold earrings, and concluded thus: “Signed in the envelope, May 16th, 1851;” underneath this, and in a different-colored ink were these words: “P. S.—The water-colored paintings in Duke Street, and whatever else of mine of worth and ornament, to my dear husband. My will revised, April 19th, 1858.”

Several alterations in red ink had been made by the deceased subsequent to the original date of the document, and it was clear from the state of the seal that the envelope had been opened after it had been sealed in the presence of the attesting witnesses.

The pleadings are sufficiently referred to in the judgment.

Dr. Tristram, for the plaintiffs.

Dr. Spinks, contra.

SIR C. CRESSWELL. In this case Mr. Henry Van Straubenzee and his wife propounded the will of the late Lady Mary Elizabeth Monck.

and alleged that in pursuance of the power contained in her marriage-settlement, and of every other authority enabling her in that behalf, she made her last will and testament, dated the 16th of May, 1851, in manner following: that two persons having by her previous request come into the room where she was then sitting, she signed her name to a paper-writing which was then on a table before her, containing the words following: "It is my wish for my dear husband to administer the moneys; the smaller bequests dear Laura will be so kind as to attend to;" in the presence of the said two persons as witnesses, who duly attested the same; and that the said deceased then, in the presence of the said two witnesses, placed two sheets of paper with writing thereon, and which were lying on the said table before the testatrix, within the first-mentioned paper-writing; and that she then, in their presence, folded up the said first-mentioned paper with the two sheets of paper within it, and sealed the same; and that the first-mentioned paper is exhibit A, and that the two others are exhibits B and C, and that the exhibits A, B, and C contain together the last will and testament of the deceased. The defendant, in his answer, admits the due execution of exhibit A, and that the deceased in the presence of the two attesting witnesses placed two sheets of paper with writing thereon, and which were then lying on the table before her, within exhibit A; but denies that the said two sheets of paper are the same as the two sheets of paper marked exhibits B and C, and denies that the exhibits A, B, and C together contained the last will and testament of the deceased.

In support of the case of the plaintiffs, the decision of the Judicial Committee in *Allen v. Muddock*, 11 Moo. 427, was relied on, and I was anxious to examine that case carefully, so as to decide the present in conformity with it, for the whole law on the subject was then collected and considered by Lord Kingsdown, in his very learned and elaborate judgment.

The facts in this case, in addition to those admitted on the pleadings, are very few. The papers B and C were found in the envelope A, but it is not shown that they are the same that were originally placed there by the testatrix. The paper B had a date at the commencement, but no other evidence was given of the time when it was written; and I cannot, for the purpose of this cause, hold that any part, still less the whole, was then written. No other evidence was given of the existence of the papers at any particular time than the fact of the envelope containing them having been delivered to Sir Charles Monck by the deceased, some time before her death, and long after the paper A was signed.

Such being the facts of the case, the judgment in *Allen v. Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon, in *Smart v. Prujean*, 6 Ves. 565, that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing in such terms that it may be ascertained. To that opinion it has been added, by subsequent

decisions, that the identity may be ascertained by the aid of evidence of the surrounding facts, in conformity with the fifth proposition of Sir James Wigram in his work on Extrinsic Evidence, referred to by Lord Kingsdown in 11 Moo. P. C. 441. Such evidence, however, can only be used to aid in the construction of what the testator has written.

In the present case I think the plaintiffs have failed to establish that the papers A, B, and C constituted the will of the deceased, on two grounds. The reference in A is not distinctly to any written paper then existing. One may conjecture that the deceased was referring to something written or to be written, but it is mere conjecture; and certainly there is no such reference to any instrument as will enable the court to ascertain it. The fact of the papers B and C being found enclosed in the envelope can have no effect, according to Lord Eldon's opinion in *Smart v. Prujean*, especially as it is not shown when they were placed there. Nor is there any legal evidence to satisfy the court when they were written. Under these circumstances, I feel bound to pronounce against the papers propounded. Paper A does not refer to any written document as then existing; and, assuming that it does, such document is not pointed out in such manner as to enable the court to ascertain its identity; and paper A, taken by itself, has no testamentary character, so as to enable the court to grant probate of it. The costs of all parties should be paid out of the estate.

GOODS OF SUNDERLAND.

COURT OF PROBATE. 1866.

[*Reported L. R. 1 P. & D. 198.*]

THE deceased, Mary Sunderland, widow, died on the 7th of April, 1866, having duly executed a will, dated March 9, 1864, and two codicils thereto, dated respectively December 30, 1864, and January 6, 1866. The residuary clause in the will was as follows: "I give all the residue of my personal estate whatsoever and wheresoever (save and except such articles of furniture, pictures, plate, trinkets, linen, and wearing apparel, in my dwelling-house at the time of my decease, as shall be ticketed or may be described in a paper in my own handwriting, to show my intention as regards the same, which intention I expect my executors to give effect to) unto the said H. Freeman, and T. F. Ormerod, &c., in trust, &c."

The deceased left paper writings, marked D and E, purporting to contain gifts of her furniture in her dwelling-house, signed by her, but unattested, and in neither of them was there any reference to either her will or codicils. Mr. Chambers, the solicitor who prepared the will and codicils, deposed that he prepared the will from her instructions;

that on the 26th of February, 1864, he attended on her with the draft of the will for her approval, when she informed him that she had expressed in writing the way in which the furniture and articles referred to in the said clause were to be disposed of, and then produced the papers D and E, and said they were the paper writings referred to in the draft of her will; but that at the time of the execution of the will, on March 9, 1864, the paper writings were not produced to or seen by the attesting witnesses; that on the execution of the codicil of December 30, 1864, the said paper writings were not referred to, or produced to the attesting witnesses by the deceased; but that on the 6th of January, 1866, the day of the execution of the second codicil, whilst his partner was copying out the second codicil for execution in another room, the deceased again produced to him the papers D and E, and again told him the same were the papers referred to in her will, and both the attesting witnesses deposed that at the time of the execution of the second codicil, the papers D and E were lying on a table in the room in which the deceased then was, and within her sight, though she did not, while executing the codicil, make any verbal reference to it.

May 12. *Dr. Spinks* moved that lists D and E should be included in the probate, on the ground that the reference to them in the will was sufficient to prove their identity, and that they were seen by the attesting witnesses at the time of the execution of the second codicil.

SIR J. P. WILDE. This case stood over to enable the court to consider whether it would be justified in granting probate to two lists said to be incorporated in the will. It appears that at the time when the will was executed the two lists had already been written by the testatrix, and were in existence. If the court were at liberty to turn to independent sources of information and investigate the question, whether she intended those papers to form part of her will, independently of the language in which she is supposed to have referred to them, there is abundant parol evidence to satisfy the court that the testatrix did intend these lists to form part of her will. But after consideration, I am of opinion that the court is not at liberty to enter into that question, and to receive that parol evidence. The court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen v. Maddock*, 11 Moo. P. C. at page 454. That limit seems to be fixed by one sentence in the judgment: "A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it." There must be a reference to a written document described as *then existing*. In *Von Straubenzee v. Monck*, 3 Sw. & Tr. at page 12,

Sir C. Cresswell said: "Such being the facts of the case, the judgment in *Allen v. Maddock* points out the conclusion at which I ought to arrive. It adopts the opinion of Lord Eldon in *Smart v. Prujean*, 6 Ves. 565, that a testamentary paper duly executed, in order to incorporate another, must refer to it as a written document then existing, in such terms that it may be ascertained."

On the authority of these cases, I hold that in order to let in parol evidence to ascertain the truth as far as it can be ascertained by such evidence, with regard to an unexecuted testamentary document, the passage in the will by which reference is made to it, must describe it as a document then existing. I think that these papers are not so described, and I therefore grant probate of the will and codicils alone.¹

GOODS OF TRURO.

COURT OF PROBATE. 1866.

[*Reported L. R. 1 P. & D. 201.*]

THE Dowager Lady Truro died on the 21st of May, 1866, leaving a will dated the 15th of September, 1865, and a codicil dated the 10th of October, 1865. The will contained the following clause: "I likewise bequeath to the present Baron Truro, in affectionate recollection of his kindness to me, all my library and books and maps, except such parts thereof as I shall herein or after or by codicil otherwise dispose of; and also all my engravings, paintings, pictures, and drawings, save and except such parts thereof as I shall herein or after or by codicil otherwise dispose of; also all my household bed and table linen, and also all such articles of silver plate and plated articles *as are contained in the inventory signed by me and deposited herewith.*"

The will was deposited by the deceased at Messrs. Coutts', the bankers, in an envelope with an indorsement in her writing, and in the same envelope with the will was found an inner envelope containing a list of plate. The list, which was in several sheets, was headed "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. AUGUSTA E. TRURO." The list was signed by the deceased in several places, and on the last sheet was her signature and the date, 21st of September, 1865. Affidavits were filed showing that the will and the list were deposited with Messrs. Coutts on the 21st of September, 1865, and that the codicil was deposited at a subsequent date. One of the affidavits also proved that when the will was executed the attention of the testatrix was called to

¹ See *Goods of Lancaster*, 29 L. J. (P. & M.) 155 (1860); *Goods of Kehoe*, 18 L. R. Ir. 13 (1884). The case of *Goods of Hunt*, 2 Rob. Ec. 622 (1853), must be considered as overruled.

the importance of signing the inventory and depositing it with her will, and that she intimated her intention of acting upon that suggestion.

The Queen's Advocate and *Dr. Spinks* moved for probate of the will of the 15th of September, 1865, the list of plate dated the 21st of September, 1865, and the codicil of the 10th of October, 1865.

SIR J. P. WILDE. I have very serious doubts whether I could allow this list to form part of the probate if the question depended upon the words of the will, because, although to some extent they point to an existing document, I should, construing them by the existing facts, read them as meaning, not that the document had been signed at the time when the will was executed, and would be deposited with it, but as meaning that it would be signed and deposited when the will should be deposited. There is no distinct reference to an existing document. For, though the testatrix, in using the words, "signed by me, and deposited herewith," would *prima facie* seem to mean "now already signed and deposited," yet those words, like all others in a written document, must be construed in connection with the existing and surrounding state of things. Now, the will could not have been deposited at the time at which the testatrix was speaking, and the list when produced was plainly not signed till the 21st of September. The true meaning, therefore, of the words, as spoken at that date, would seem to be, "a list which I intend to sign and deposit," &c. It is, however, unnecessary to decide whether the list is incorporated with the will, because I am of opinion that it is entitled to probate by force of the codicil.

This makes it material to look into the decisions on the subject. The general rule as to the consequences of republication is thus laid down by a most careful and learned text-writer: "It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing, and makes it *speaking*, as it were, *at that time*. In short, the will so republished is a new will." (Williams on Executors, part i. b. ii. § 2, page 188, 5th ed.)

He then goes on to refer to numerous cases which have been decided in accordance with this principle, and amongst others to *Skinner v. Ogle*, 4 N. of C. at page 79, where it was held that "a codicil duly executed will give effect and operation to a will altered after the passing of the Act, although the alteration was not duly attested, and though the will itself was executed before 1838," and to *In the Goods of Hunt*, 2 Robert. 622, where Sir John Dodson held that a codicil duly executed will give effect to unexecuted papers which have been written between the periods of the execution of the will and the codicil, although the latter does not refer to the former.

The question came before Sir C. Cresswell in March, 1863, *In the Goods of Stewart*, 3 Sw. & Tr. 192, and in June, 1863, *In the Goods of Matthias*, 3 Sw. & Tr. 100. In the first case, the will contained this clause: "I direct my executors to distribute all pictures, books,

and other articles according to any list or lists signed by me." A paper was found without any date, but which was executed before a second codicil, headed "List referred to in my will and codicil." The second codicil commenced "This is a codicil to the last will and testament of me . . . I hereby confirm my last will with all the codicils thereto duly signed by me." "Held that the unattested paper was sufficiently identified and referred to in the will, and having been signed before the execution of the codicil was entitled to be admitted to probate as a portion of the will confirmed by the codicil."

In the second case the testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862. On her death the will and two codicils and a paper headed "Memorandum of trinkets referred to in my will" were found folded together in a locked portfolio. There was no evidence to show that the memorandum was in existence when the will was executed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. It was held "that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate." The learned judge is reported to have said: "Assuming it as a fact that the memorandum was in existence before the date of the last codicil, can that entitle it to form part of the probate? There is nothing to show that the memorandum was in existence when the will was signed; it therefore formed no part of the will. How can the execution of the codicil, which is a re-execution of the will, make that to be a part of the will which was no part of the will before, and the codicil contains no reference to the memorandum?" And accordingly probate of the memorandum was refused. Now there is no doubt that probate could not have been granted of that memorandum, because, treating the will as having been re-executed at the date of the second codicil, the reference was not sufficient to incorporate it according to the rule laid down in *Allen v. Maddock*, 11 Moo. P. C. 427. But if the language of the learned judge was intended to have a universal application, if it is to be taken as laying down a general rule that by the kind of re-execution of a will which is involved in the execution of a codicil nothing can be inferentially added to a will which it did not contain before, it is at variance with the decision of the same learned judge in *In the Goods of Wyatt*, 2 Sw. & Tr. 495. In that case a testator executed a draft will in April, 1847, and an engrossed will in May, 1847. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and in pencil. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink but not as altered in pencil. Pro-

bate was decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil. If the proposition laid down by the learned judge in *In the Goods of Matthias* is a general one, that decision cannot be supported. I think that the proposition is not a general one, but must be read in reference to the case to which it refers.

After considering these cases I have come to the following conclusion as to the rule by which the court should in future be guided in dealing with the republication of a will by a subsequent codicil.

It is plain on the one hand that the republication of the will, which is involved in the execution of a codicil, may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. The case just quoted, *In the Goods of Wyatt*, 2 Sw. & Tr. 494, in which the codicil was held to give effect to alterations made in the will after its execution, is a direct authority for this proposition. On the other hand it is plain that there must be a very distinct limit to the action of the court in this direction. For the tendency of such a doctrine, if not restrained, would be to place unexecuted papers on the same footing with those which have received due execution, merely because they were in existence at the subsequent date of the execution of a codicil. The court cannot, according to the authorities, give greater or less effect to a codicil than this: to treat its execution as if the testator had at the same time sat down and re-executed his will. Looked at in that light, the following rule would appear to be the consequence: Where the will, if treated as executed on the date of the codicil, and read as speaking at that date, contains language which, within the principle of *Allen v. Maddock*, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date.

Applying that doctrine to the present case, and treating this will as having been re-executed on the date of the codicil, its language runs thus: "And also all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." Now, construing these words by the light of the events which had then happened, they appear with sufficient distinctness to refer to a document then existing. For the inventory referred to had then been signed by the testatrix and deposited at the bankers. The operation of the codicil as a re-execution of the will, therefore, gets rid of all difficulty, and I admit the will and the codicil to probate, together with the inventory signed by the testatrix.

GOODS OF MARY REID.

COURT OF PROBATE. 1868.

[Reported 38 L. J. (N. S.) (P. & M.) 1.]

MARY REID, late of Oxford Parade, Cheltenham, in the county of Gloucester, widow, died on or about the 19th of October, 1867, leaving a duly executed will and codicil. The will bore date the 24th of May, 1864; the codicil was not dated, but it appeared from the affidavit of the attesting witnesses that it was executed in the latter part of April or the beginning of May, 1866. By her will she gave all her ready money to her executors, "to pay her funeral expenses, &c., as also some small sums as remembrances to friends, to be named in a letter addressed to my two nieces, Margaret G. Thain and Lilius Thain," whom she appointed residuary legatees. In disposing of certain sheep in Australia, she divided the flock into four parts. Three of these she specifically bequeathed, and then continued, "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter."

The codicil ran thus: "In consequence of some deaths in our family, it is necessary that I add a short codicil to my will, &c. In the first place, my set of pearl ornaments, which I then left to Mary Eweretta Thain, in consequence of her early and melancholy death, so much lamented by us all, I must now destine to someone else, and as Mrs. Thain has no female in her family that either she or I would wish to possess those family jewels, *I now leave them as intimated in the letter addressed to my residuary legatees.*"

The will and codicil were found in an envelope in a sealed parcel. In the same parcel, but in a separate envelope, two unexecuted testamentary papers were also found. Paper No. 1 bore date the 1st of March, 1866, and commenced thus: "To my dear nieces, Margaret G. Thain and Lilius Thain, named in my last will and testament as my residuary legatees, and to whom I there stated it was my intention to address to them a letter which I wish to be equally binding and legal as if its contents had been expressed in the will itself. This my intimated intention I now shall endeavor to perform." The paper gave trifling legacies to certain friends and acquaintances, and also referred to her pearls, — this reference and some other portions of the document being in pencil.

Paper No. 2 simply expressed a wish that the fourth part of the sheep in Australia might go towards forming a fund to pay off a debt on a cottage, and had at the foot of it "Cheltenham, 1865." Both papers were in the handwriting of the deceased.

Dr. Swabey moved for probate of the will and codicil, together with the two unexecuted testamentary papers as incorporated by reference.

Although the will does not refer to an existing paper, the unexecuted documents were written before the codicil, and in it the reference "I now leave them as intimated in the letter addressed to my residuary legatees" is a reference to an existing document.

SIR J. P. WILDE. I think that those papers cannot be admitted to probate as part of the will. Dealing with the case as it appears on the face of the will, the unquestionable rule of law is that the will must refer to a paper as existing at the time, and then that the reference must be in such terms that the paper referred to can be fairly recognized. Now this will does not refer to an existing paper at all. It is said very truly that the language of the will is future, and points to a future document; and, further, the document which is asked to be incorporated refers to the fact that the testatrix intended to write such a paper, and it then goes on to say that this is the document which she so intended. It is quite plain therefore that the document referred to in the will was of a future character. But then comes the codicil. In *The Goods of Lady Truro*, 35 Law J. Rep. (N. S.) Prob. & M. 89; s. c. 1 Law Rep. Pr. & Div. 201, it was decided that the effect of a codicil was to make the will speak as if executed on the date of the codicil, but that is all. It was there said, "Where the will, if treated as executed on the date of the codicil and read as speaking at that date, contains language which, within the rule of *Allen v. Maddock*, 11 Moo. P. C. 427, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so, if the will had been originally executed at the later date." But the language of this instrument, read it as you will, is language of a future character, and therefore it seems to me that it cannot fall within the rule laid down in the case to which I have referred. It is quite true that the effect of the codicil is to bring down the will to that date, and that the codicil speaks of leaving certain jewels "as intimated in the letter addressed to my residuary legatees;" but then the language is ambiguous. It might point to an existing paper, but it might also point to a future paper, and the testatrix herself, when she was obviously speaking of a future paper in the will, used similar language — "the other portion to be given to my residuary legatees, to be appropriated by them as specified in my letter." The court cannot see on the face of the will or codicil any distinct reference to an existing document, and still less that these documents existed at the time of their execution. Under these circumstances, the court can only grant probate of the will and codicil.

BURTON v. NEWBERY.

CHANCERY DIVISION. 1875.

[Reported L. R. 1 Ch. Div. 234.]

JOSHUA MALDEN, by his will, dated the 7th of December, 1837, and duly attested, devised certain real estate, specifically described, and all and singular other his messuages, lands, tenements, hereditaments, and real estate to George Newbery and John Ryland, and their heirs upon trust to receive the rents and profits thereof during the lives of his daughters, Elizabeth Burton and Mary Morton, and apply such rents upon the trusts therein mentioned, and from and after the decease of Elizabeth Burton and Mary Morton upon trust to sell the same, and hold the proceeds of sale upon the trusts of his (the testator's) residuary personal estate; and the testator thereby bequeathed his residuary personal estate upon certain trusts during the lives of Elizabeth Burton and Mary Morton; and after their death he directed the same to be equally divided between such of his thirteen grandchildren therein named (two of whom were William Burton and Ann Burton) as should being grandsons attain twenty-one, or being granddaughters attain that age or marry.

By a codicil dated the 12th of October, 1838, and attested by Elizabeth Burton, William Burton, and Ann Burton, the testator directed that the rents of certain real estate purchased by him on the 13th of July, 1838, and the 10th of October, 1838, should be disposed of in the same manner as the rents of all his other estates; and he further desired that his executors should sell such real estate, and dispose of the proceeds in the same manner as the moneys arising from all his other estates.

The testator made another codicil, dated the 1st of April, 1839, and in the following terms: "This is a codicil to my last will dated 7 December, 1837: and I hereby give and bequeath unto my daughter Elizabeth Burton £600, which I desire my executors to pay to her within twenty-four months after my decease." This codicil was duly attested by two witnesses.

The testator died shortly after the date of the last codicil. Of the thirteen grandchildren named in the will, twelve (including William Burton and Ann Burton) attained twenty-one.

The suit was instituted for the administration of the trusts of the testator's will, and now came on to be heard on further consideration. Elizabeth Burton and Mary Morton were both dead; the testator's real estate had all been sold; and the question was, whether the testator had effectually devised to William Burton and Ann Burton two twelfth

shares of the proceeds of the property comprised in the codicil of the 12th of October, 1838.

Waller, Q. C., and Hamilton Humphreys, for William Burton and Ann Burton.

Chitty, Q. C., and Everitt, for some of the other grandchildren.

Southgate, Q. C., Shebbeare, Jolliffe, Stallard, Whitehorne, and F. W. Stone, appeared for other parties.

JESSEL, M. R. The case I have before me is one of some little singularity, and perhaps of some novelty, and it compels me to consider some of the prior authorities, and to say how far they appear to me to be consistent with principle. The 15th section of the Wills Act in effect makes void any gift by a testamentary instrument to attesting witnesses and certain other persons, such as the wives and husbands of attesting witnesses; but it does not in any other way affect the validity of the testamentary disposition. If, therefore, a testator makes a testamentary disposition containing a gift to the attesting witness, the attesting witness takes nothing under it.

This particular testator having made his will on the 7th of December, 1837, before the Wills Act, made a first codicil, which bears date the 12th of October, 1838, and thereby gave benefits to the attesting witnesses. It is clear, if nothing more had been done, that those benefits would not have been taken by them. He then made a second codicil, not, however, calling it a second codicil, which bears date the 1st of April, 1839, and it is in these terms: [His Lordship read it as set out above.] The first point raised on behalf of the claimants is this: they say that the effect of this second codicil is equivalent to a re-execution of the first codicil, in other words, that the second codicil is not only equivalent to the re-execution of the will standing alone, but of the will plus the first codicil, and the question I have to decide is, whether that is the effect of the second codicil. I wish I could say that the law on the subject was clear; that it was perfectly consistent with principle; and that the authorities were not to a great extent conflicting. I cannot say so; but I can say what is my opinion of the law derived from those conflicting authorities, and having regard to principle.

Now it appears to me that any testamentary instrument properly attested may incorporate into it by reference as a part of the testamentary instrument any prior writing, whether such prior writing be attested or not, and that if the incorporation is made in such a manner that the court can find out from the properly attested instrument what is the prior instrument intended to be referred to, then the prior instrument becomes a part of the testamentary instrument to all intents and purposes.

That I take to be the principle, and the question is whether such reference is necessary. I think it is, and as I read the judgment of Baron Bayley, in the case of *Doe v. Evans*, 1 Cr. & M. 42, he puts the law very much in the way I have stated. The will was written on part of a sheet of foolscap paper, and the codicil was written on the

same sheet, and the learned judge says: "Now, if the codicil had not referred to the will, I should have thought that it did not set up that instrument; but if the codicil do refer to the will, then I am of opinion that it does set it up." In other words, the mere fact of its being a codicil alone will not do; it must refer in some shape or another to the instrument which is set up. In the case of *Aaron v. Aaron*, 3 De G. & Sm. 475, which came before Vice-Chancellor Knight Bruce, he recognized the authority of *Doe v. Evans*. Whether he also intended to recognize the authority of *Gordon v. Lord Reay*, 5 Sim. 274, I am not sure. After reading at length the judgment of Baron Bayley, in *Doe v. Evans*, he says (3 De G. & Sm. 479): "Now, it can make no difference whether the codicil be written on the same paper with the will or written at a subsequent period or not. Here a codicil is referred to, and there is no dispute what the instrument was." Then he reads the codicil at full length, and you find that it begins thus: "Whereas I, John Aaron, have made and duly executed my last will and testament in writing, bearing date the 23d day of August, 1828, and also a codicil annexed thereto, bearing date the 21st of May, 1831." Then he says, "It is perfectly clear, in my opinion, what the instrument here mentioned is." Of course; it was described as a codicil. Then he goes on, "The intention of the second codicil, as collected from the whole of it, was to confirm the first codicil. That is done by an instrument duly attested. Now, whatever I might have thought of this question independently of the case of *Gordon v. Lord Reay*, and the observations of Bayley, B., in the case in the Exchequer, I must, if I am to decide myself without having the opinion of a court of law, say that the effect of the will and second codicil was to place the first codicil in the same situation as if it had been attested by three witnesses." He does not say there whether he does or does not approve of *Gordon v. Lord Reay*; but these two cases of *Doe v. Evans* and *Aaron v. Aaron* are entirely in accordance with what I consider to be the principle, which is, that the setting up instrument must contain a distinct reference to the prior writing, so as to show that the testator intends that prior writing to be a part of his testamentary disposition.

Gordon v. Lord Reay is a case very difficult to deal with. In argument, undoubtedly the point was taken by Sir Edward Sugden for the defendants. He says that an instrument duly attested can only republish an instrument not duly attested to which it expressly refers.

In *Gordon v. Lord Reay* there was a codicil, which, as the law then stood, was perfectly valid as regarded personal estate; but it was not valid as regarded real estate for want of due attestation. Then there was a second codicil, which was in these terms: "Whereas I have in and by my last will and testament, bearing date the 17th of August, 1812, made several provisions and bequests in favor of Susan Harriet Hope," &c., "now I do hereby confirm such bequests and provisions,"

“and I do hereby ratify and confirm this by my hand and seal, dated the 13th of August, 1818,” and there is nothing more. A reference is made to provisions made by the will, with the date of it, and a confirmation is made of those provisions. The testator had also made substantial provisions for the lady by the first codicil, but I confess I cannot find, on the face of the second codicil, any reference whatever to the first codicil, nor can I find any reference to any will which would include the codicil, because the only will referred to is a will bearing date the 17th of August, 1812, which was the date of the original instrument, and the codicil was dated the 8th of April, 1814. Therefore it is not (as was put to me in argument) the case of a man saying simply “I confirm my will,” and it being held that the term “will” included every testamentary disposition, whether contained in a thing called a will as distinct from a codicil, or in a thing called a will, being a will plus several codicils. The only reference was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. I am obliged to say this, because I admit that the decision was the other way. Unfortunately, we have no reasons given. The judgment of the Vice-Chancellor is in these terms: “My opinion is that the second codicil does republish the first. The first codicil is part of the will.” [It was part of the will for the purpose of the personal estate, but not part of the will for the only purpose for which the Vice-Chancellor had to consider it—that is as regarding real estate.] “And if the second codicil is a republication of the will, it is a republication of everything which is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it.” It does appear to me that that is a fallacy, that where you describe a will by its date you do not describe the subsequent codicil as being included in that will. It may well be, that where you describe a will generally, without date, and say, “I confirm my will,” you might interpret the word “will” as including the whole of the testamentary disposition; but it does appear to me that that was not the case in *Gordon v. Lord Reay*, and I cite, in reference to this point, the observations made in the case of *Crosbie v. MacDoual*, 4 Ves. 610, and those made by Lord Selborne in the recent case of *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19. They both go to this, that a mere reference to an instrument with a date is not a reference to the subsequent instrument. The point in *Crosbie v. MacDoual* was this: The testator made a will; he then made several codicils, the fourth of which revoked certain annuities given by the will, and then, last of all, he made a codicil confirming the will, but not all the codicils, and the question was whether he had revived the gift which had been revoked by the intermediate codicil. It was held he had not: and the then Master of the Rolls distinguished the case from the case of *Lord Walpole v. Lord Orford*, 3 Ves. 402, where a man having made two wills, and unfortunately not having destroyed the first, made a codicil, and the transcriber having the first

will before him, as well as the second, by mistake (of which they would not allow evidence to be given), confirmed the first will, which was inconsistent with and had been revoked by the second; and it was held that the confirmation of the first will, though it had been revoked, set it up again. It was a writing which, though revoked and good for nothing, was as much incorporated by the codicil as though it had been written out again in words, and consequently it revoked the intermediate and inconsistent will. But, as pointed out by the Master of the Rolls, that does not apply to a will and codicil followed by a second codicil inconsistent with the prior codicil; there is no occasion in such a case to assume that you do revoke the intermediate codicil. So in a case where you make a will with subsequent codicils, you may intend merely to revoke the will, and leave the codicils standing, which was the decision in *Farrer v. St. Catharine's College*. There, the argument was pressed that the revocation of a will, being the revocation of everything which is part of it, must revoke all the codicils. The answer was, you do not revoke the will in that sense, but you revoke an instrument called a will of a certain date; therefore the revocation does not go beyond that. I must say it does not appear to me that the case of *Gordon v. Lord Reay* was decided according to principle, and that the true principle was that which was laid down by Baron Bayley in *Doe v. Evans*, which has been certainly followed, whereas I am not able to find that the case of *Gordon v. Lord Reay*, though quoted, has ever been followed at all.

Then there is a second point, which is this: The codicil gives certain after-acquired lands substantially on the same trusts on which the testator had given the residue of his real estate. According to the doctrine now established by *Christie v. Gosling*, L. R. 1 H. L. 279, you are to read the words referred to as if they were incorporated in the instrument. The consequence would be that the attesting witness would take a share of the money to arise from the sale of the lands; but then that share is forfeited by the law. What becomes of it? It falls into the residue. Any lapsed or void gift falls into the residue, and consequently the shares of the attesting witnesses will be divided among all the residuary legatees. But it was said that the residuary legatees cannot take under the first codicil, which directs the money to be divided in accordance with the provisions of the will without carrying out all these provisions. That appears to me to be a fallacy. It is not, in fact, a case of election at all, they take simply what is given to them by the instrument. The dispositions of that instrument are not effectual to the extent to which a share of the property is given to the attesting witness, not by reason of the terms of the will or codicil, but by reason of the law which annuls the gift. You have, therefore, to look, not at the meaning of the codicil, but to the effect of the codicil with the addition of the statutory enactment which annuls a portion of its effect, and you have to read it in exactly the same way as if these persons had been excepted from the portion of the will incorporated by

reference, consequently they can by no possibility be held to take anything under such words of reference. Therefore I hold that their shares are simply void gifts and fall into the residue, and are divisible among them as well as the other residuary legatees.

GOODS OF SMART.

PROBATE DIVISION. 1902.

[*Reported L. R. [1902] P. 238.*]

MOTION for probate of a will and codicil, incorporating a certain memorandum book purporting to contain bequests of specific articles. The opinion of the Court was sought at the desire of the beneficiaries.

Bargrave Deane, K. C. (Elgood with him), for the executors.

GORELL BARNES, J. This is a motion to obtain the opinion of the Court as to whether a certain book, or lists in it, is to be incorporated with the will and codicil of Miss Ann Caroline Smart. The lady made a will on February 28, 1895, which contains a clause as follows: "I give to my said cousin, Margaret Rose Smart, all my furniture, books, plate, linen, wearing apparel, and personal effects of a like nature during her life for her own absolute use and benefit, and from and after her decease I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will the different articles specified for such friends in such book or memorandum, and as regards any of such articles not specifically disposed of by me, I declare that the said Margaret Rose Smart shall have full power to absolutely dispose thereof." At the time when this will was made, as far as I can make out from the affidavit which has been filed, there was no such book as that mentioned in the will, or, if there was, it is not in existence; but, after the date of that will, there is a book which I understand, though it is not deposed to on affidavit at present, is in the handwriting of the lady, beginning "1898. Hints for Executors; amended 1899," and on the fourth page, I think it is, of the book there commences a list with regard to clothing and other articles, and it is with regard to the articles mentioned in the book that the question really arises. After, at any rate, the date at which the book appears to have been written up, a codicil appears to have been made by the lady, dated July 27, 1900. I do not find that any reference is made to the book in any codicil; but the codicil before me deals with a considerable number of dispositions, and winds up by stating that in all other respects the testatrix confirms the said will. The question is, therefore, whether the book, so far as it is referred to, if referred to at

all, in that clause which I read from the will, is to be incorporated with the will and codicil. I have already practically intimated my view that it ought not to be incorporated, and I might have contented myself with saying that I come to that conclusion in consequence, principally, of a decision of the President in the case of *Durham v. Northen* [1895] P. 66; but Mr. Deane argued that that case was inconsistent with other authorities, and that the authorities were in conflict amongst themselves; so I desired to look through them to see if that contention could be properly supported. Before referring very briefly to the cases, it seems to me desirable to state how the principle upon which this matter ought to be decided appears to my mind. It seems to me that it has been established that if a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of his will; in other words, it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained. A leading case upon this subject is *Allen v. Maddock* (1858) 11 Moo. P. C. 427, and it is desirable also to refer to *In the Goods of Mary Sunderland* (1866) L. R. 1 P. & M. 198. It will be seen from a statement of the principle in the form I have just given, that the document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document. If the document is not existing at the time of the will, but comes into existence afterwards, and then, after that again, there is a codicil confirming the will, the question arises, as it has done in a number of these cases, whether that document is incorporated. It appears to me that, following out the principle which I have already referred to, the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil, and if the informal document is existing then, and is referred to in the will as existing, so as to identify it, there will be incorporation; but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which shew that it is referring to a future document, then it appears to me there is no incorporation. I might put a clear concrete case. Suppose that the will said, “I wish certain articles to be disposed of by my executors in accordance with a list which I shall hereafter write,” and the testator then wrote a list such as was contemplated, and then, after that, a codicil was made confirming the will, one of the conditions at the date of the codicil which is necessary for incorporation would be fulfilled, namely, the execution of a document; but the other condition would not be fulfilled, because the will, even speaking from the date of its so-called re-execution by that

confirmation by the codicil, would still in terms refer to something which even then was future. I have, perhaps, stated a little more fully than is necessary what was very clearly and shortly said by the President (Sir F. H. Jeune) in the case to which I have referred, [1895] P. 66. Now, referring very briefly to the other authorities, the first which Mr. Deane cited was the case of *In the Goods of Hunt*, 2 Rob. 622, where the learned judge, Sir John Dodson, was dealing with two schedules which were to be annexed to the will, and where the codicil had been afterwards executed, and he allowed those documents to be incorporated; but it is clear, from reading the remarks which are reported, that no reasons whatever are given for the judgment, and it does not seem to me that there is anything to shew upon what principle the learned judge acted, or that he was then considering the principles applicable to this matter in the way in which they were subsequently and fully considered in the case of *In the Goods of Lady Truro*, L. R. 1 P. & M. 201. The next case referred to was *In the Goods of Stewart*, 3 Sw. & Tr. 192; 4 Sw. & Tr. 211, where Sir Cresswell Cresswell said that the list which was mentioned in the will hardly conformed to the reference to it; but, acting upon *In the Goods of Hunt*, 2 Rob. 622, he allowed the incorporation, though with doubts. There, again, no reasons were given; but in the case of *In the Goods of Mathias*, 3 Sw. & Tr. 100, decided two or three months later, but reported earlier in the same volume, Sir Cresswell Cresswell said no reasons were given for the decision in *In the Goods of Hunt*, 2 Rob. 622, and he then acted contrary to it. Next comes the important case of *In the Goods of Lady Truro*, L. R. 1 P. & M. 201, where the subject was very fully considered, and the principles, so far as I have stated them in my own way, are really laid down. Those principles were applied in *In the Goods of Mary Sunderland*, L. R. 1 P. & M. 198, and also in *In the Goods of Mary Reid*, 38 L. J. (P. & M.) 1; and lastly, they are restated and acted upon by the President in the case to which I have referred, [1895] P. 66.

Therefore, to my mind, it is clear that if the terms of the reference in this case indicate a document of a future character there is no incorporation. The words are: "I direct my trustees to give to such of my friends as I may designate in a book or memorandum that will be found with this will." That reference, made at the date of the will, was, I think, clearly made as to a future document. A document next comes into existence, and a codicil is afterwards made; but if you treat the will according to the cases, as speaking at the date of the codicil, the reference is still in terms to a document which, even then, is future, and therefore does not comply with one of the necessary conditions, namely, that it must refer to a document as existing at the date when the will is re-executed.

For these reasons I think there ought to be no incorporation of the book, or that part of it which it is sought to incorporate. I suppose

that is sufficient to dispose of this application? This is clearly a case in which the executors ought to have the costs of this application out of the estate.¹

MOORE'S CASE.

PREROGATIVE COURT OF NEW JERSEY. 1900.

[Reported 61 N. J. Eq. 616.]

ON appeal from the Union county orphans court. On exceptions to an inventory and final account.

Messrs. Glen & Rosinger, proctors for the exceptant.

Messrs. Lindabury, Depue & Faulks, proctors for the executor.

REED, VICE-ORDINARY. James Moore died August 14th, 1897, leaving a will, which was probated August 27th, 1897, and letters testamentary issued to James H. Moore, his son and surviving executor.

The will contained the following clause :

"In making division of my property aforesaid as above directed I hereby further direct that certain amounts of money that I have already advanced or may hereafter advance to certain of my children, shall in each case be charged against the portion of each of said children, and be inventoried as part of the estate of which I may die seized, at the full amount of the charge in each instance, but without interest thereon. All such charges are contained in sealed envelopes to be found with this my last will. All other evidence of indebtedness against any of my said children, which I may have at my death, I hereby give and bequeath to such debtors, respectively, to each child the evidence of his or her indebtedness, and discharge each of said debtors from all his or her obligations in respect to such and all indebtedness for any such advances or debts, except such as I have heretofore specified as being left with this my will.

"These amounts I cannot at present certainly indicate, as they are liable to be changed before my death by payments to be made or by further advances by me."

After the testator's death the executors found the will in a sealed envelope, and with it three other papers, signed by the testator, one of which was in the following form :

"ELIZABETH, N. J., February 22d, 1893.

"The sum of \$14,000 is to be charged to account of my son Thomas (without interest) for money heretofore advanced by me to him in accordance with the provisions of my will contained in the third section thereof.

"JAMES MOORE."

¹ See, accord, *Durham v. Northen*, L. R. [1895] P. 66.

The point taken by Thomas Moore, the exceptant, is that "this paper is an attempt to add to, change or complete the provisions of a will by a subsequent paper not executed with the formalities required by the statute of wills."

There is no doubt that a testator can provide that the amount to be received by a legatee shall be dependent upon a condition of fact to be ascertained *aliunde*. Some of these conditions are noted by Chief-Justice Denio, in his opinion in the leading case of *Langdon v. Astor's Executors*, 16 N. Y. 1, 26.

This is so, even though the condition may be brought about by the testator himself. *Stubbs v. Sargon*, 3 Myl. & C. 507.

The testator could have provided that all advances made to, or debts owing by, a legatee, whether made or incurred before or after the execution of the will, should be deducted from his portion. Such amount may be ascertained by parol evidence, and may be varied by advancements made subsequent to the execution of the will. 1 Underh. Wills, 447.

A frequent testamentary provision is that such debts or advancements as are charged on testator's books against legatees shall be deducted, and these provisions are valid. *Robert v. Corning*, 89 N. Y. 227.

When a testator provides that such advancements as are indicated by entries, to be subsequently made by him, shall be deducted from the share or legacy, a mere entry, it seems, unless there have been advancements in fact, will not suffice. *Hoak v. Hoak*, 5 Watts, 80.

Parol evidence is admissible to support the book entries. *Estate of Mussleman*, 5 Watts, 9; *Gilman v. Gilman*, 63 N. Y. 41.

In the present case I think it appears that, before the execution of the will, testator had paid to, and for the benefit of, the exceptant moneys, which were never repaid, to an amount in excess of \$14,000. It is to this sum that the testator alludes when he speaks of the amounts of money "that I have already advanced." The checks produced, taken in connection with the explanation of the exceptant himself, seems to establish this fact.

It is true, the exceptant says, after admitting advances to the amount of \$15,000, that he is equitably entitled to a deduction, because his father promised to make up to him certain commissions for the sale of the Staten Island railroad, if his son would abandon his suit for the same. He does not say that his father promised to make it up to him in any particular manner. It does not appear whether it was to be made up to him by relieving the son from the amount which he (the father) had loaned to the firm of Mason, Peas & Moore and the firm of Peas & Moore, for which sum his son, as a member of the bankrupt firm, was responsible, or whether he was to make it up to him in some other unexplained manner. So I am of the opinion that the testator

had the right to regard the \$15,000 in money, which the exceptant admittedly received, as money advanced.

Now, the testator having the right to provide that such advances should be charged to the portion of exceptant, the question remains, did he defeat his intention to charge some of the advances by providing that the amount which he intended to charge should be evidenced by a paper made subsequently to the execution of his will?

In my judgment the paper which contained the charge is not to be regarded as testamentary in its character. The effect of the contents of the paper was restrictive. Suppose the testator had said, I charge all the debts owing to me, which I have not discharged or forgiven at the time of my death, and the receipt, release or paper evidencing such discharge will be found with my will. This would seem analogous to a provision containing a gift of certain property, unless it should be conveyed before the testator's death. The fact that he mentioned where such deed or conveyance could be found, if made, would be in no degree material. It being proved that more than \$14,000 had been advanced to this legatee, the paper which expressly charged him with only \$14,000 was impliedly a gift of the remainder of the advances.

I think that the decree of the orphans court should be affirmed.¹

BRYAN'S APPEAL.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1904.

[Reported 77 Conn. 240.]

APPEAL from a judgment of the Superior Court in New Haven County, *Gager, J.*, refusing to admit to probate a certain written instrument as part of the will of Philo S. Bennett of New Haven, deceased. *No error.*

Henry G. Newton, Harrison Hewitt, and Charles A. Towne of New York, for the appellants (*Bryan et al.*).

Henry Stoddard and William H. Williams, for the appellees (*Mrs. Bennett et al.*).

TORRANCE, C. J. The Court of Probate for the district of New Haven approved and admitted to probate a certain writing as the last will of Philo S. Bennett, deceased. That will contained, as its 12th clause, the following: "I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (\$50,000), in trust,

¹ See *Holmes v. Coates*, 159 Mass. 226 (1893); *Dennis v. Holsapple*, 148 Ind. 297 (1897).

however, for the purposes set forth in a sealed letter which will be found with this will." At the time this will was offered for probate there were also offered for probate as a part of it, under the 12th clause of the will, two writings hereinafter referred to as exhibits *B* and *C*.

The Court of Probate refused to approve or admit to probate as parts of said will each and both of these exhibits; and from that part of its decree an appeal was taken to the Superior Court, by William J. Bryan individually, and as trustee under the will as he claims it to be. The will admitted to probate is in the record called Exhibit *A*; while exhibits *B* and *C* are letters which, as the appellant claims, constitute a part of the will. The will was executed in New York, and is dated the 22d day of May, 1900.

Exhibit *B* is a letter from the testator to his wife, of which the following is a copy:—

"NEW YORK, 5/22/1900.

"MY DEAR WIFE, — In my will just executed I have bequeathed to you seventy-five thousand dollars (75,000) and the Bridgeport houses, and have in addition to this made you the residuary legatee of a sum which will amount to twenty-five thousand more. This will give you a larger income than you can spend while you live, and will enable you to make bountiful provision for those you desire to remember in your will. In my will you will find the following provisions:

"I give and bequeath unto my wife, Grace Imogene Bennett, the sum of fifty thousand dollars (50,000), in trust, however, for the purposes set forth in a sealed letter which will be found with this will.

"It is my desire that fifty thousand dollars conveyed to you in trust by this provision shall be by you paid to William Jennings Bryan, of Lincoln, Nebr., or to his heirs if I survive him. I am earnestly devoted to the political principles which Mr. Bryan advocates, and believe the welfare of the nation depends upon the triumph of those principles. As I am not as able as he to defend those principles with tongue and pen, and as his political work prevents the application of his time and talents to money making, I consider it a duty, as I find it a pleasure, to make this provision for his financial aid, so that he may be more free to devote himself to his chosen field of labor. If for any reason he is unwilling to receive this sum for himself, it is my will that he shall distribute the said sum of fifty thousand dollars according to his judgment among educational and charitable institutions. I have sent a duplicate of this letter to Mr. Bryan, and it is my desire that no one excepting you and Mr. Bryan himself shall know of this letter and bequest. For this reason I place this letter in a sealed envelope, and direct that it shall be opened only by you, and read by you alone. With love and kisses, P. S. Bennett."

Exhibit *C* was a typewritten duplicate of Exhibit *B*, except that the words "with love and kisses, P. S. Bennett," at the end of Exhibit *B*, were not contained in Exhibit *C*, nor was Exhibit *C* signed by the testator.

Respecting these exhibits the appellant in the Superior Court offered evidence tending to prove the following facts: that about a week or ten days before the date of the will, at the city of Lincoln, Nebraska, the testator, and Mr. Bryan and his wife, prepared a blank draft form of the will, which was subsequently filled out and executed, and that Exhibit *C* was then also prepared as a blank draft form from which Exhibit *B* was to be, and was subsequently, drawn; that Exhibit *B* was in the handwriting of the testator, and was by him placed in a sealed envelope bearing the following indorsement in his handwriting: "Mrs. P. S. Bennett. To be read only by Mrs. Bennett, and by her alone, after my death. P. S. Bennett. (Seal)"; that the testator, on the day after the date of the will, placed said will and said envelope containing Exhibit *B* in his box in a vault in the Wool Exchange Building in New York City, where they remained as he put them until after his death, the will being "separate from said letter and said sealed envelope;" and that Exhibit *C*, from the time it was drawn up, remained in Bennett's custody till his death, and was found soon after that event among his private papers, in an envelope subscribed in Bennett's handwriting as follows: "Copy of letter in Safe Deposit Company vault, Wool Exchange."

The appellant then offered Exhibit *C* in evidence as part of the will, claiming that it was the original and equivalent of the paper Exhibit *B*, "and that it was substantially the sealed letter referred to in paragraph 12 of the will." The court excluded the evidence. The appellant thereupon offered in evidence, as part of the will, the letter Exhibit *B*, and the court excluded it. The appellant also offered parol evidence tending to prove that Exhibit *B* was the instrument to which reference was made in clause 12 of the will, but the court excluded such evidence. Subsequently the jury, under the direction of the court, rendered a verdict to the effect that exhibits *B* and *C* "are not either separately or together a part of the last will of said Philo S. Bennett, deceased;" and judgment followed in accordance with the verdict.

From the opinion of the trial court, which is made part of the record, the rulings of the court seem to have been based upon several distinct grounds, which may be briefly indicated: (1) Apparently upon the ground that the doctrine of incorporation by reference does not prevail as to wills, under our statute relating to their making and execution; (2) that even if that doctrine prevails here, no paper in the present will is by reference made a part of it, according to the rules universally applied in jurisdictions where the above doctrine prevails; and (3) that the letter, Exhibit *B*, shows on its face an intent on the part of the testator that it should not constitute a part of his will.

As we think the rulings of the court below can be vindicated upon the second of the grounds above mentioned, it will be unnecessary to consider the other two grounds; but in thus resting our decision upon the second ground we do not mean to intimate that it could or could not be made to rest upon the first or third.

Before considering the second ground a word or two regarding the first ground may not be out of place. Under the rule prevailing in England, an unattested document may, by reference in a will, under certain conditions and limitations, become by such reference incorporated in the will as a part of it; and that too whether the document referred to is or is not a dispositive one; and one of the leading cases upon this subject is that of *Allen v. Maddock*, 11 Moore's P. C. C. 427, decided in 1858. This is known as the doctrine of incorporation by reference; and the principle upon which it rests does not differ essentially from that which is applied in incorporating unsigned writings in a signed instrument so as to constitute a memorandum in writing under the statute of frauds. The English rule appears to prevail in many of our sister States; but the question whether it prevails in this State, and if so, with what limitations and under what conditions, was left undetermined in *Phelps v. Robbins*, 40 Conn. 250, and has never been passed upon since. In the present case we find it unnecessary to decide those questions; but for the purposes of the argument we shall assume, without deciding, that the doctrine of incorporation by reference in a will prevails here.

Two of the conditions, without the existence of which the English rule will not be applied, are concisely, but we think correctly, stated in *Phelps v. Robbins*, *supra* (272), as follows: "First, the paper must be in existence at the time of the execution of the will; and, secondly, the description must not be so vague as to be incapable of being applied to any instrument in particular, but must describe the instrument intended in clear and definite terms." In a California case upon this subject this language is used: "But before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit and unambiguous as to leave its identity free from doubt." *Estate of Young*, 123 Cal. 337, 342. In an important and well considered English case, decided in 1902, the court uses this language upon this subject: "But it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a writing existing — that is, at the time of the execution — in such terms that it may be ascertained. . . . The document which it is sought to incorporate must be existing at the time of the execution of the document into which it is to be incorporated, and there must be a reference in the properly executed document to the informal document as an existing one, and not as a future document." *In the Goods of Smart*, L. R. (1902) P. D. 238, 240.

Tested by the rules as thus laid down in the cases above cited, and in numerous others that might be cited, the will in the present case fails to comply with the required conditions under which incorporation by reference can take place in the case of wills. In clause 12 of the will in question here a large sum of money is given to Mrs. Bennett "in trust, however, for the purposes set forth in a sealed letter which will be found with this will." There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter, or any number of them, setting forth the purposes of the trust, made by anybody, at any time after the will was executed, and "found with the will," would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is "so vague as to be incapable of being applied to any instrument in particular" as a document existing at the time of the execution of the will; "the vice is that no particular paper is referred to." *Phelps v. Robbins*, 40 Conn. 250, 273. Such a reference as is made in the present will is, in fact as well as in law, no reference at all; certainly it is not such a reference as the rules under the doctrine of incorporation by reference require in the case of wills.

A reference so defective as the one here in question cannot be helped out by what is called parol evidence; for to allow such evidence to be used for such purpose would be practically to nullify the wise provisions of the law relating to the making and execution of wills. We know of no case, and in the able and helpful briefs filed in this case have been referred to none, where a reference like the one here in question has been held to incorporate into the will some extrinsic document.

Assuming then, without deciding, that the doctrine of incorporation prevails in this State, as claimed by the appellant, we are still of the opinion that the rulings of which he complains were correct.

There is no error.

In this opinion the other judges concurred.¹

¹ See *Johnson v. Ball*, 5 De G. & Sm. 85 (1851); *Thayer v. Wellington*, 9 All. 283 (Mass. 1864); *Booth v. Baptist Church*, 126 N. Y. 215 (1891).

E. Competency of Witnesses.

HOLDFAST d. ANSTEY v. DOWSING.

KING'S BENCH. 1746.

[Reported 2 Str. 1253.]

EJECTMENT for lands in Cambridgeshire on the demise of Christopher Anstey, D.D., and Mary his wife. And upon a trial at bar the jury found this special verdict.

That James Thompson, Esq., being seised in fee of the premises in question, and of sound mind, signed, sealed, and published a paper writing, purporting to be his last will, dated 10 February, 1742, and which is found *in hæc verba*: by this he declares, that he devises to the defendant the lands in question for life, remainder to his first and every other son and sons in tail male, remainder to his daughters as tenants in common, with a reversion in fee to the right heirs of the devisor: then he charges all his real and personal estate with particular annuities and legacies, and particularly an annuity of £20 *per annum* to Elizabeth the wife of John Hailes for her life and to her separate use; and he also gives a legacy of £10 each to John Hailes and his wife for mourning. That to this will there are three persons who subscribe their names as witnesses, whereof John Hailes is one; and that in their presence, and of nobody else, he signed, sealed, and published the paper writing as and for his last will; and they three attested the same in his presence, and are all three living. They find the identity of John Hailes the legatee and subscriber, and that Elizabeth his wife is still living. That the devisor died May 28, 1743, without issue, and seised as aforesaid, and that Mrs. Anstey (one of the lessors) is his aunt and heir-at-law. They find that before and at the time of the trial the defendant made a tender to John Hailes of £20 for his and his wife's legacies, which he refused to accept, and that those legacies are not discharged. Then they find the entry and demise by the lessors, &c., *sed utrum, &c.*

This cause was three times argued at the bar, and this term the CHIEF JUSTICE delivered the resolution of the court.

The question upon this special verdict is, whether in the light Hailes now stands, he is to be considered as a credible witness within the intent of the Statute of Frauds. And we are all of opinion he is not.

The right to devise in this case is not a common law right, it being inconsistent with the notion of a feudal tenure (Wright's Tenures, 174); but it depends upon powers given by Statutes, which must all be considered together, as creating one general parliamentary rule: the particulars of which are, that it must be in writing, signed, and an attestation of three credible witnesses in the presence of the devisor. These were checks introduced to prevent men from being imposed upon; and certainly meant, that the witnesses (who are required to be

credible) should not be such as claim a benefit by the will. Though a will may be read, on proof of all the circumstances by one witness; yet that is upon a supposition, there are two others, who could be allowed to give the same testimony.

If the tender would be equal to the payment of the two money legacies (as it is not), yet the annuity charged upon the estate devised would still subsist; and though it is charged both upon real and personal estate, and the personal (which is not found to be sufficient) would be the first fund, yet it is for Hailes' advantage to enlarge the fund by taking in the real estate; and we must at law consider the husband as benefited by the annuity, though given to her separate use; for it is his money the moment it is paid into her hands, or if not, it eases him in point of maintenance.

It was objected, that nothing vests till the death of the deviser, and therefore at the time of the attestation he had no interest. But the answer is, that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against.

Another way by which it was attempted to be supported is, that it may be void as to the annuity, but good as to the devise to the defendant; which is grounded upon an expression in Carthew's report of the case of *Hilliard v. Jennings*, 514, that the will was void *quoad the devise of lands to the plaintiff*. But whoever reads that will from the record will see, that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands; and it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will.

Consider what a door this would open to fraud: a man has four estates, and is beset by four, who fraudulently procure a will, whereby each has a separate estate devised to him. If one is allowed to be a witness for the other three, they thereby establish it for the whole. In 1 Ld. Raym. 730, it is held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 Mod. 263, the party benefited in one sheet cannot be set up to prove every other sheet.

It was agreed, this man could not be examined; how then is he that credible witness that the Statute requires?

The true time for his credibility is, the time of attestation; otherwise a subsequent infamy, which the testator knows nothing of, would avoid his will.¹

And as to what is said in Swinb. 296, it relates only to wills of personal estate, and cannot affect the construction of the Statute.

The Digest, lib. 28, tit. 1, l. 22, *De testibus, subscriptione, et signis*, is express: *Conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*, and so is the Code, lib. 6, tit. 23, l. 1.

We therefore hold this not to be a good attestation of a will of lands;

¹ In *Pendock v. Mackender*, 2 Wils. 18 (1755), a will was held void where a witness at the time of execution had been convicted of stealing a sheep.

and then the title of Mrs. Anstey the lessor of the plaintiff as heir-at-law is not defeated by what is set up as a will; and consequently the plaintiff must have judgment.¹

¹ A writ of error was brought in the Exchequer Chamber and there argued, but the cause was compromised before judgment. *Holdfast v. Dousen*, 1 W. Bl. 8, 15 (1747). This case gave rise to the Statute of 25 Geo. II. c. 6 (1752), p. 34, *ante*. In *Wyndham v. Chetwynd*, 1 W. Bl. 95; s. c. 1 Burr. 414 (1757), it was *held* by Lord Mansfield and the Court of King's Bench on an issue of *devisavit vel non* to try the validity of an alleged will of Mr. Chetwynd, who died in 1750, that attesting witnesses who were creditors at the time of the attestation, but whose debts had been paid off at the time of the trial, were credible witnesses within the Statute of Frauds. The will charged the testator's real estate with the payment of debts.

In *Doe d. Hindson v. Kersey* (1765) John Knott, by his will, dated 1734, devised land to six trustees in trust to dispose of the rents and profits to poor orphans, aged and impotent people, within the township of Mauls Meburn, and to put out the children of such poor people apprentices. At the trial of an ejectment, brought by the heir, it appeared that two of the attesting witnesses were trustees, and all three of the witnesses at the time of the attestation, and at the testator's death, were respectively seised of lands in Mauls Meburn, and were assessed to and paid the poor tax there, but that before the trial the witnesses who were named as trustees had released all their interest under the will to the other trustees, and that all the witnesses had conveyed away their said respective lands. On a special case reserved, the Court of Common Pleas held that the will was well attested. Pratt, C. J. (afterwards Lord Camden), dissented in an opinion which was printed in a separate pamphlet, and will be found reprinted at length in 1 Day, 41-88, *note*.

In *Brograve v. Winder*, 2 Ves. Jr. 634, 636 (1795), "An objection was made to the competency of one of the witnesses to the will, as interested at the time of his examination: but as he had no interest at the execution of the will and the death of the testator, the Lord Chancellor [Lord Loughborough] held him to be a good witness."

In the United States the generally received doctrine is that attesting witnesses must be competent at the time of the attestation. In Pennsylvania no subscribing witnesses are required; see *Kerns v. Sozaman*, 16 S. & R. 315 (1827); and in Maryland, although it is held that a witness must be competent at the time of attestation, it is also held that a legatee is a competent attesting witness, and so if he releases his legacy he may testify at the trial. *Shaffer v. Corbett*, 3 H. & McH. 513 (1797). See *Jackson v. Smith*, 1 Johns. Cas. 163 (1799).

In *Castine Church, Appellant*, 91 Me. 416 (1898), property was bequeathed to A, and, in case A died before the testator, then to B and C. B was one of the attesting witnesses, and was held to be incompetent. STROUT, J., said, p. 423:

"The true test is, whether the will itself conferred directly or conditionally, a beneficial interest upon the witness. By this will, Agnes T. Hooper was to receive a pecuniary benefit upon the happening of an event, which might happen, and had the interest and hope, at the time of attestation, which such provision held out, to sustain the will. It is argued that the interest to disqualify, must be a certain and vested interest. Suppose an estate were given for life to the father of several children, remainder to his children surviving at his death? The children living at date of the will would not have a certain or vested interest. One or more of them might die before the father, and never acquire any interest in the estate. But it would hardly be claimed that the children were competent witnesses to the will, — that they had no beneficial interest under it, within the meaning of the statute, and no interest to uphold the will.

"If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law; and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency."

In *Sullivan v. Sullivan*, 106 Mass. 474 (1871), one of the three attesting witnesses

BETTISON v. BROMLEY.

KING'S BENCH. 1810.

[Reported 12 East, 250.]

THIS was an issue directed by the Master of the Rolls, to try whether a paper writing dated 28th April, 1807, and purporting to be the will of the late Sir Geo. Pauncefote, Bart., was executed by Sir George in the manner required by law to pass real estate. The plaintiffs maintained the affirmative, and the defendant the negative: and at the trial before Lord Ellenborough, C. J., at Westminster, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of the court on this case.

The testator was of sound mind; the will was attested by three witnesses, and the execution of it in every respect regular, supposing the witnesses were competent: but an objection was made to the competency of Susan Smith, one of the attesting witnesses, on the ground that she was the wife of Jeremiah Smith, whom the testator had named one of his executors in the will, and who, with the other executors, had proved the will and acted. Jeremiah Smith was not a creditor of the testator, either at the time of the execution of the will or of the testator's decease; and he had no interest but what (if any) appeared on the face of the will. A copy of the will accompanied the will; but Jeremiah Smith appeared to take no beneficial interest under it. The question reserved was whether Susan Smith were a competent witness to prove the execution of the will? If she were, the verdict was to stand; if not, a verdict was to be entered for the defendant.

Dampier, for the plaintiffs.

Littledale, contra.

LE BLANC, J., said that the only question here was whether this were a good will of land: and whatever the decision might be, it would not affect any question concerning the probate in the Commons.

And all the COURT agreed upon the principal point, that the will was well proved in this case. LORD ELLENBOROUGH, C. J., said that the

was the wife of a devisee. By statute, it was provided that "all beneficial devises, legacies and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the same." (Cf. St. 25 Geo. II. c. 6, *ante*.) It was argued that within the reason and effect of this statute, a devise to the husband of the witness was a beneficial devise to her, and therefore void, leaving her a competent attesting witness to the will. But the Court held that such construction of the statute was not permissible and that the will was invalid. See, *accord*, *Giddings v. Turgeon*, 58 Vt. 106 (1886); *Fisher v. Spence*, 150 Ill. 253 (1894). Cf. *Hatfield v. Thorp*, 5 B. & Ald. 589 (1822); *Winslow v. Kimball*, 25 Me. 493 (1846).

By the Wills Act, § 15, *ante*, it is provided that gifts to the husband or wife of an attesting witness shall be void, and such witness competent. And there are similar statutes in many of the United States. See Woerner, *Amer. Law Adm.* (2d ed.) § 41.

point had been decided so long ago as Lord Hale's time, that an executor, having no interest in the surplus, was a good witness to prove the will in a cause concerning the estate : and this had been followed by other decisions to the same effect. Here the executor took no interest under the will, but only a burdensome office. The other judges concurring.

Postea to the plaintiffs.

SEARS v. DILLINGHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[Reported 12 Mass. 368.]

THIS was an appeal from a decree of the Judge of Probate of the County of Barnstable, approving and allowing the last will and testament of Thomas Snow, late of Harwich in said county deceased.

The reason assigned for the appeal, pursuant to the Statute, was that the said testator was not, at the time of executing the supposed will, of sound and disposing mind and memory. All the requisites of the law having been complied with on the part of the appellant, and the appeal having been entered October Term 1813, at Barnstable, an issue was directed by the court and joined by the parties, to try by jury the sanity of the testator : but the original will not being then produced in court, the cause was continued to the next term, October 1814, when it proceeded to trial.

The said Dillingham was a subscribing witness to the will, and with Thomas Snow, jun., appointed executor thereof.

Before the trial came on, doubts having been suggested of Dillingham's competency to testify on the trial, although he had no bequest or devise to him in the will ; he moved for leave to surrender and resign his appointment and trust of executor to said will.

But it was determined by the court, that having accepted the trust, and given bonds faithfully to perform it, he could not afterwards be permitted to renounce.

At the trial, the said Dillingham was offered on the part of the executors and devisees, as a witness to prove the execution of the will and the sanity of the testator ; but on motion of the appellant he was rejected as incompetent, on the ground of his being a party to the process liable to the payment of costs, if the decree of the judge of probate should be reversed.

Upon the testimony of the two other subscribing witnesses, and much other evidence, a verdict was returned upon the issue, that the said testator was of sound and disposing mind and memory at the time of executing the said will.

An objection was then taken by the counsel for the appellant, that the will was not authenticated pursuant to the Statute of 1783, c. 24, § 2, which requires the attestation of three credible witnesses.

The cause, being continued *nisi* for the consideration of this objection, was argued at this term by *Whitman* for the appellant, and *Thomas* for the respondents. In support of the objection it was said that Dillingham, not being a competent witness at the trial, could not be a *credible* witness to attest the will, the object of the Statute being to require such subscribing witnesses, as could testify at the time of the probate of the will, and afterwards, if necessary, upon appeal to this court.

At the following September Term in Berkshire, the opinion of the court was delivered by

PARKER, C. J. The first question to be decided in this case is, whether Dillingham was rightly rejected as a witness at the trial. For if he ought then to have been admitted, it is obvious that the other objection would be superseded.

The court, which made that decision, was competent to make it definitively; but as there was no opportunity to consult books at the place where the trial was had, it is proper to re-examine the question, so far as may be necessary to settle the point now immediately before us. And we are satisfied that the decision was right in principle, as well as conformable to the practice in this State on the rules of evidence.

It seems that by the common law an executor, who is not residuary legatee, and has no beneficial interest in the estate, may be a witness, to prove the execution of the will and the sanity of the testator; being considered a mere trustee and nominal party, having no real interest in the contest. So likewise a guardian in socage, or a devisee in trust for other persons, may be a witness in support of the will. But it is held that a guardian of record cannot be a witness in favor of his ward: and the reason given is, that he is liable for the costs of the suit, if it should be determined against the ward.

By parity of reason, an executor in this State, who by Statute is liable to costs upon an appeal, is not competent to testify upon a trial: for he is not merely a nominal party, but is directly and personally interested in the event of the suit. The interest may be slight; but it may also be important, as the costs in the case of a will, contested on the ground of the insanity of the testator, are usually not inconsiderable. But this rule has been invariably adhered to in the courts of this State, there being no instance of an executor, administrator, or guardian being admitted to testify, to support actions in favor of the estates they represent: their being parties, and liable eventually to costs, having been always deemed a sufficient objection.¹

The decision of the court, therefore, against the admission of Dillingham as a witness, was right: and this opens the question intended to be saved for consideration, — whether, as one of the subscribing witnesses was incompetent at the time of the trial, the will was attested by three credible witnesses, pursuant to our Statute, which prescribes the manner of devising lands, tenements and hereditaments.

¹ But see *Wyman v. Symmes*, 10 All. 153 (Mass. 1865).

The construction given to the term *credible*, as used in the Statute, by this court in the case of *Amory v. Fellowes*, 5 Mass. Rep. 229, is somewhat different from that which was adopted by Lord Mansfield in the celebrated case of *Windham v. Chetwynd*, 1 Bur. 414, in discussing the effect of the same word in the English Statute of Frauds and Perjuries. The meaning of the Statute, according to our decision, is that the will shall be attested by three witnesses who are competent to testify; and this competency must exist at the time of the subscription, and not be acquired by act *ex post facto*; as was settled in England in the case of *Anstey v. Doucning*, 2 Str. 1253.

It must necessarily follow from the rule, that a subsequent incompetency will not affect the formal execution of the will. Otherwise the commission of a crime, which renders infamous, — or the succession to an estate under a devise, would disable a witness, who was free from any taint of crime or interest at the time of subscribing: a doctrine, which would greatly embarrass the practice of disposing of estates by will, and produce constant uncertainty in the minds of testators, whether their property would be appropriated according to their wishes.

Incompetency to give testimony arises only (except that in some instances a witness is excluded on the ground of policy) from interest and infamy; both of which may arise long after the execution of a will, and frequently without the knowledge or after the death of the testator. In such cases, proof of the handwriting of the witnesses, who were competent at the time of the attestation, and who cannot be sworn at the trial, or of their actual signing in the presence of the testator, by some witness who remains competent, must be resorted to; or many wills, against which no objection would lie at the time of their execution, would be defeated.

Cases may arise when none of the attesting witnesses can be examined: as if they should all be dead, or should become infamous after the attestation, or should have gone into foreign parts beyond the authority of the State, or the power of the persons interested to obtain depositions. In such cases, there seems to be no reason why the rules of law, which admit of evidence of an inferior character in relation to deeds and other instruments, should not be applicable to a will as to a deed or bond; provided the formalities required by the Statute appear to have been observed.

If then Dillingham was a competent witness at the time he attested the will, there can be now no legal objection to it because of his subsequent incompetency. He appears to derive no interest whatever under the will, not being residuary legatee, or having any devise or bequest in it. He is merely named executor, with another person who is residuary legatee. He could not, even by accepting the trust, acquire any interest; although he might subject himself to some liability, which would render him incompetent afterwards to testify. But this at the time was contingent, and depending altogether upon his assent. Had he died before the testator, the will might have been proved and com-

mitted to the other executor to administer alone; or had he renounced the trust, the same disposition would have been made. No person could have been more free from interest, than he was at the time of attestation. He might not have known at the time of signing, that he was named executor in the will. For the witness need not know the contents of the will which he attests: and even the testator might not have known that the person he had named as executor, was called as a witness; it not being necessary that he should see the witness face to face.

It was argued, however, that no will can be proved, unless all the subscribing witnesses, who are alive and within the control of the court, are produced to testify. This, as a general rule, is undoubtedly well settled both here and in England. But there are obvious exceptions, as necessary to be regarded as the rule itself. The case of witnesses having become infamous instantly occurs, as one of the exceptions. They may be alive, and within the control of the court, and yet their testimony cannot be had, and the will may be proved without it. The same reason is applicable to witnesses, who have become interested without the consent of those who claim under the will.

If it be said that such persons may be produced, and the heir may waive his objections to them, and avail himself of their testimony; the same may be said of an executor: and indeed an example is furnished in the present case. It was only at the instance of the heir that Dillingham was rejected, he being in court at the trial and offered as a witness.

We are all of opinion that this will was duly executed according to the Statute: and as the verdict has disaffirmed the reason of appeal, the decree of the judge of probate must be affirmed, with costs for the respondents.¹

¹ See, *accord*, *Richardson v. Richardson*, 35 Vt. 288 (1862); *Rucker v. Lambdin*, 12 Sm. & M. 230 (Miss. 1849). Cf. *Woerner*, Amer. Law Adm. (2d ed.) § 41.

If an attesting witness is named as executor, he does not lose his office or his commissions. See *Meyer v. Fogg*, 7 Fla. 292 (1857); *Stewart v. Harriman*, 56 N. H. 25 (1875); *Matter of Will of Wilson*, 108 N. Y. 874, 876 (1886); *Jordan's Estate*, 161 Pa. 893 (1894). See, *contra*, *Murphy v. Murphy*, 24 Mo. 526 (1857); *Noble v. Burnett*, 10 Rich. 506 (S. C. 1857). Cf. *In re Pooley*, L. R. 40 Ch. D. 1 (1888).

PEASE v. ALLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1872.

[Reported 110 Mass. 167.]

APPEAL by the person named as executor in an instrument purporting to be the will of William S. Allis, from a decree of the Probate Court, disallowing the instrument as the will of William S. Allis. At the hearing, before Ames, J., it appeared that one of the three witnesses to the instrument was the wife of William S. Allis. The judge reported the case for the determination of the full court "upon the question of law involved: if the wife was a competent witness, the will to be admitted to probate; otherwise, the appeal to be dismissed, and the decree of the Probate Court affirmed."

G. Wells (*N. A. Leonard* with him), for the appellant.

M. P. Knowlton (*G. M. Stearns* with him), for the appellee.

CHAPMAN, C. J. By the Gen. Sts. c. 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest. None of our Statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. *Davis v. Dinwoody*, 4 T. R. 678; *Hatfield v. Thorp*, 5 B. & Ald. 589; *Sullivan v. Sullivan*, 106 Mass. 474.

As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent.

Decree affirmed.

NOTE. — In *Hitchcock v. Shaw*, 160 Mass. 140 (1898), the testator had given to a town the interest of a fund to be used each year in the purchase of books for the town library. One of the attesting witnesses was an inhabitant of, and a tax-payer in, the town. At the time the will was executed, a library was maintained by the town for the use of all its inhabitants, and the money received from the dog fund, so-called, was usually appropriated therefor. Held, that such witness was competent. LATHROP, J., said, p. 142: "In the case at bar, the interest of the witness was so contingent and remote that we are of opinion that he was a competent witness. While a town may raise money, under the Pub. Sts. c. 40 § 10, for the maintenance of a public library, it is not obliged by law to do so. It cannot therefore be said that the gift necessarily has the effect of diminishing the taxes of the witness. But even if the town were obliged to raise money for the maintenance of its library, it would be merely conjectural to say that the taxes would be any less on account of the gift contained in the instrument before us."

"It is further contended that the use which the witness may have of the books purchased with the fund renders him incompetent. But a benefit of this kind, which is purely consequential, cannot be regarded as an interest affecting the competency of the witness."

See to the same effect *Cornwell v. Isham*, 1 Day, 35 (Conn. 1802); *Haves v. Humphrey*, 9 Pick. 850 (Mass. 1830); *Warren v. Baxter*, 48 Me. 193 (1859).

In *Will v. Sisters of the Order of St. Benedict*, 67 Minn. 335 (1897), the testator

was a member of, and by her will gave all her property to, an incorporated religious order, organized for charitable purposes. Each member of this order was by its by-laws required to give all her present and future property to the corporation as well as her services without compensation. The will was attested by two other members of the order. *Held*, that the witnesses did not have any present, certain, or vested pecuniary interest in the property given by the will and therefore were competent to attest it. See, *accord*, *Quinn v. Shields*, 62 Iowa, 129 (1888).

See *Patten v. Tallman*, 27 Me. 17 (1847).

Under the Statute of Frauds and the St. 25 Geo. II. c. 6, a witness to a will of personalty did not lose a legacy. *Emanuel v. Constable*, 3 Russ. 486 (1827).

Under the Wills Act a bequest to a trustee is not invalidated by his wife's being a witness. *Cresswell v. Cresswell*, L. R. 6 Eq. 69 (1888).

A legacy in a will is not lost by the legatee's attesting a codicil which confirms the will, not even if he be a residuary legatee, and the codicil revoke legacies, thereby increasing the residue. *Gurney v. Gurney*, 3 Drew. 208 (1855). Nor under the Wills Act does a devisee lose his devise by marrying an attesting witness after the attestation. *Thorpe v. Bestwick*, L. R. 6 Q. B. D. 311 (1881).

Both under the St. 25 Geo. II. c. 6 and the Wills Act, one who signs a will as a witness will lose a devise to him, although there be enough competent witnesses without him. *Doe d. Taylor v. Mills*, 1 Mood. & R. 288 (1833); *Wigan v. Rowland*, 11 Hare, 157 (1863). But cf. *Randfield v. Randfield*, 8 H. L. C. 225, 232 (1860); *Goods of Sharman*, L. R. 1 P. & D. 661 (1869). In many of the United States this is otherwise by Statute. See 1 Woerner, Amer. Law Adm. (2d ed.) § 41.

F. Attestation.

1. WHAT IS ATTESTED

ELLIS v. SMITH.

CHANCERY. 1754.

[*Reported 1 Vcs. Jr. 11.*]

PARKER, C. B.¹ The questions in this case arise on the fifth and sixth sections in the Statute of Frauds. The first is, Whether testator's declaration before three witnesses, that it is his will, is equivalent to signing it before them; and constitutes a good will within the fifth section; and, 2dly. Whether such will is a revocation according to the sixth.

The formalities requisite to a will are, 1st. That it be in writing. 2dly. That it be signed by the party devising, or some other in his presence and by his direction. 3dly. That it be attested and subscribed in his presence by three or more witnesses.

I confess, if this had been *res integra*, I should doubt, whether the testator's declaration is a proper execution within the fifth clause; because, I think, an admission that it is sufficient tends to weaken the

¹ This case was heard before LORD HARDWICKE, C., assisted by SIR JOHN STRANGE, M. R., SIR JOHN WILLES, Lord Chief Justice of the Common Pleas, and SIR THOMAS PARKER, Lord Chief Baron of the Exchequer. Only the opinion of the last is given; all the others were to the same effect.

force of the Statute ; and let in inconveniencies and perjuries, which the Statute designed to prevent ; but I find myself bound by such a number of former precedents, that I must give way to their superior weight. The case of *Lemayne v. Stanley*, 3 Lev. 1, must, I think, have come before the court on this very question now before us ; for I can see no other ; it being allowed in that case on all hands that signing in any part of the will was sufficient. In *Skin*n. 227, Lord Jefferies declared, he thought the testator's acknowledgment sufficient. Com. 197. Lord Trevor of the same opinion : and in *Dormer v. Thurland*, 2 P. Will. 510, Lord King inclined to think a will of land good, if the testator acknowledged the name to be his, and the witnesses subscribed in his presence. The case of *Lee v. Libb*, Carth. 35, has been insisted on ; and brought to bear down the authorities I have now mentioned. But what was that case ? There was only one witness to the will, and two to the codicil ; neither therefore had three witnesses ; *ergo*, not good. Indeed Lord Holt there said, he thought, the witnesses should attest the signing ; but that was an *obiter dictum*. To strengthen the authorities I have already mentioned, I shall take notice of the cases, which allow the witnesses to subscribe at different times ; and I think, they support the admission of the declaration in question ; since the testator is not supposed to run over his name before every witness ; but having signed before one, to acknowledge it only before the rest.

In *Cook v. Parsons*, Prec. Ch. 184, the Lord Keeper held a publication of a will before three witnesses, though at three several times, good within the Statute ; and in *Jones v. Lake*, the court decreed, that the witnesses may subscribe at different times. As to the point, whether sealing be signing, as has been contended ; I own, I think, it is not ; for the character and handwriting are necessary ; and were designed to prevent or detect frauds and impositions. But however as in some cases it is thrown out *obiter*, and in one case decreed, that it is equal to signing, I shall submit my opinion.

As to the second question, Whether such will is a revocation within the sixth section of the Statute, I think it is ; and that a revocation may be by any will executed according to the fifth section ; for the words, "*signed in the presence of three witnesses*," &c., relate only to the preceding words, "*any other writing*." The clause is to be construed in the disjunctive ; viz. either by will, codicil, &c., or, by writing signed before three witnesses. In 3 Lev. 86, held no revocation, because neither will nor codicil ; but had it been either, it would have been otherwise : Upon the whole therefore, I think, this is a good will, and a good revocation.

WHITE v. TRUSTEES OF BRITISH MUSEUM.

COMMON PLEAS. 1829.

[*Reported 6 Bing. 310.*]

THIS was a feigned issue upon the question, whether William White, deceased, did, by a certain paper-writing, purporting to be his last will and testament, demise his freehold estates or not. And, upon the trial, the jury found a special verdict, setting out the paper-writing in question, and finding that the whole of the same, except the names of the witnesses, was in the handwriting of the said W. White: that the said W. White signed the said paper-writing before it was signed by the witnesses John Hounslow, Mary Bristow, and Thomas Badcock, or either of them: that he died on the 13th May, 1823; that about five months before his death, he requested the said John Hounslow and Mary Bristow to sign their names to the said paper-writing, and they respectively, in pursuance of such request, did sign the same in the presence of the said W. White, but that they did not see the signature of the said W. White to the said paper-writing, and were not informed by the said W. White, when they so signed the said paper-writing, or at any other time, what was the nature thereof, or the purpose for which he requested them to sign the same: that, about three months before the death of the said W. White, he requested the said Thomas Badcock to sign his name to the said paper-writing, which he immediately did in the presence of the said W. White: that at the time of signing the said paper-writing by the said Thomas Badcock, the said W. White informed him that the said paper-writing was his will. The special verdict then went on to state, that the paper-writing consisted of two sheets of paper produced to the jurors; that the two sheets were in the same room at the times of the respective signatures of the three persons above mentioned; and that William White was of sound and disposing mind and memory at the time he signed the paper, and also at the time the three other persons signed their names as aforesaid.

It appeared from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly inure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And it appeared that, immediately above the names of the witnesses, there was written in the hand of the testator these words, "In the presence of us as witnesses thereto."

The case, after having been argued once, was sent down again for a more precise finding of the facts; and the foregoing special verdict having been found, was argued again in Trinity Term last.

Wilde, Serjt., for the defendants.

Adams, Serjt., *contra*.

Cur. adv. vult.

The judgment of the court was now delivered by

TINDAL, C. J. (After stating the facts as *ante*), Upon this special verdict, the question is, Whether in the execution of this will, the several requisites contained in the Statute of Frauds have been duly observed? By the 29 Car. 2, c. 3, § 5, it is enacted, "that all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of non-effect." And as the special verdict finds that the whole of the paper-writing is in the handwriting of W. White, and that he signed it before it was signed by the witnesses, the jurors do find in terms, that there is a devise in writing, and that it is signed by the party who makes the devise.

Again, it is found expressly that the names of the three persons were signed by them upon the paper-writing in the presence of the said W. White; that is, in the language of the Statute, the writing was subscribed in the presence of the devisor. So that the inquiry is simplified and reduced to this single question, Whether the devise was attested by them within the meaning of the Statute?

It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis v. Smith*, which was decided by Lord Chancellor Hardwicke, assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willis, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point.

The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the Statute the word attested will have no force whatever, and may be considered as if it had never been inserted.

The question, however, appears to us to be, Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses, that this instrument was his will? for if by what the devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instru-

ment to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis v. Smith*.

In the execution of wills, as well as that of deeds, the maxim will hold good, *Non quod dictum sed quod factum est, inspicitur*.

Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question, is the very paper-writing which was produced by the testator to the three witnesses. The great object of the direction of the Statute, that witnesses shall subscribe in the presence of the devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

In the next place, it appears from the special verdict, that the devisor was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

But further it appears from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly inure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And, lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written in the handwriting of the testator these words, "In the presence of us as witnesses thereto," which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the Statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the Statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the Statute.

*Judgment for defendants.*¹

¹ See, accord, *Osborn v. Cook*, 11 Cush. 582 (Mass. 1853); *Gould v. Chicago Theological Seminary*, 189 Ill. 282 (1901).

GOODS OF GUNSTAN.

PROBATE DIVISION. 1882.

[Reported 7 P. D. 102.]

ACTION commenced in the Probate Division by Henry Blake, claiming probate in solemn form of a document alleged to be the last will of Mary Gunstan.

Sir J. Hannen, President, rejected proof of the will; and William Willoughby Gunstan, a legatee under the will, who had obtained leave to intervene, appealed.

Dr. Deane and *Dickens*, for the appellant.

Inderwick, Q. C., *C. A. Middleton*, and *T. Lee Roberts*, contra.

JESSEL, M. R.¹ I regret that I am unable to come to the conclusion that this will was properly executed. I say I regret, because from a mere accident, a want of form, that which was clearly the last will of this lady must fail of effect, and the persons interested under it be disappointed.

The real question is, what the law requires to be proved in order to support a will so that it shall be validly executed.

In this case it does not appear that the testatrix signed her name to this document in the presence of the witnesses. I invited the counsel for the appellant to argue the question upon the basis of these witnesses having seen the lady sign her name, but I agree that *Dr. Deane* knew more of the case than I did, and was wise in declining to argue it on that footing, for on careful examination of the evidence in this case I think it is clear that this will was not signed in the presence of either witness; it is evident that the signature took place before they came into the room. The question, then, arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment under the Statute? What I take to be the law is correctly laid down in *Jarman on Wills*, 4th ed. p. 108, in the following terms: "There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will;" and I may add, in my opinion, it is not sufficient even if the testator were to say, "My signature is inside the paper," unless the witnesses were able to see the signature. There is a great deal of authority on this point, several cases are referred to in the note to the passage which I have read, but I think it is sufficient to mention three cases only. The first is *Hudson v. Parker*, where, 1 Rob. 25, the matter is most elaborately discussed by *Dr. Lushington*. He tells us what in his view is the plain meaning of acknowledging a signature in the presence of witnesses; he says, "What do the words import but this? 'Here is my name written, I acknowledge that name so written to have been written by me; bear witness.' How is it possible that

¹ Only the opinions on the appeal are here given.

the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there *and seen* at the time; for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning, acknowledgment, and approbation."

Now I have to consider the case of *Beckett v. Howe*, Law Rep. 2 P. & D. 1, where a different rule was laid down by Lord Penzance. At page 5 he says, "The doctrine of *Gwillim v. Gwillim*, 8 Sw. & Tr. 200; 29 L. J. (Pro.) 31, is this, that if the testator produces a paper and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the court is satisfied that the signature of the testator was on the will at the time. Whether that decision was right or wrong I have not to determine. It was founded on other cases. Provided the testator acknowledges the paper to be his will and his signature is there at the time, it is sufficient." I dissent from the proposition of Lord Penzance, and agree with the ruling of Dr. Lushington, and therefore I hold that it is not sufficient to say "This is my will." The argument that that will do is founded on the notion that the statement by the testator "This is my will" implies that his signature is affixed to it; but that is not so, a will is not a valid will until it is attested, and there is no necessary implication that it already bears the testator's signature. It may be that the testator has not yet signed it, but may intend to do it, and it is quite possible that he may in that sense call it a will, inasmuch as it will, when executed, be a will. But I say that if he had distinctly said that he had signed the will, but yet the witnesses would not be able to see his signature, that is not a sufficient acknowledgment. Is there any doctrine to the contrary? Lord Penzance does not, to my mind, lay down any new doctrine; he thought himself bound by the decision of Sir Cresswell Cresswell in *Gwillim v. Gwillim*. I will now turn to that case, and with great deference to Lord Penzance, I do not think Sir C. Cresswell laid down such a doctrine. I agree people may, in reading the decision, as I am bound so to say, considering that Lord Penzance so read it, come to the same conclusion as he did, but I think that Sir C. Cresswell did not decide or intend to decide anything of the kind. In *Gwillim v. Gwillim*, the signature of the testator (as printed in the report) is placed immediately above the signature of the witnesses. If nothing was put upon the signature it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the argument therefore turned upon the

question whether the signature was there or not. The present question was not under discussion. The material part of the judgment is on page 205, "I am therefore at liberty to judge, from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not. It is hardly likely that this testator, who knew that there must be two witnesses to the will, did not also know that he must sign it before they did, and either sign it or acknowledge it in their presence. Then if I look at the position of the words, I find at the top of the third page, 'My will and testament, 1856, March 31st.' Under that comes 'Brange, Mar. 31, 1856,' that being the time and place at which the old ladies say they were asked to sign the will. Under that comes 'John Gwillim,' and then the word 'witness' a little below on the left hand side where one would expect to find it. I cannot, therefore, but think that the name of the testator was written at that time, and that by asking these old ladies to witness his will he did acknowledge his signature."

Now that I say is *Hudson v. Parker*, 1 Rob. 14. The witnesses were taken to have seen the signature, and the testator having then asked them to witness his will, he was held to have acknowledged his signature. I cannot find one word in the judgment to show that Sir C. Cresswell was of opinion that if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson v. Parker*. The existence of any such doctrine rests entirely on the statement of Lord Penzance in *Beckett v. Howe*; and as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett v. Howe* is no authority.

If that is so, there is only one other point, and that is, did the witnesses see the signature? I am of opinion upon the evidence that they did not. Susan Harradine says in express terms that she did not; that there was a piece of blotting-paper over the signature. I have looked carefully at the original writing, and the appearance of the document strongly confirms this statement of the witness. The words, including the signature of the testatrix, are dull and blurred as if they had been blotted, and it would appear as if the blotting-paper reached down below the signature of the testatrix. The other witness says the same thing in the first instance, and then subsequently that she sometimes thought that she did see the signature, but she could not say whether she did or not. I must upon this evidence come to the conclusion that it is most satisfactorily, or rather most unsatisfactorily, proved that these witnesses did not see the signature.

I refrain from going into the next question whether sufficient expressions were used by the testatrix as to the document being her will. If it were necessary I should take more pains to consider the meaning of the words used; but I think it is unnecessary to do so on the present

occasion, having regard to the conclusion of fact that the witnesses did not see the signature of the lady, and the decision of the learned President pronouncing against the will must be affirmed.

BRETT, L. J. In this case we have a document which is in form a will, leaving a large amount of property, and it is undoubted that the testatrix meant thereby to deal with her property in the manner therein pointed out, and it is equally clear that she signed the document meaning it to be her will, and equally clear that she thought she was complying with the requirements of the Statute, and that this document represents her last and final intentions as to the disposition of her property.

That being so, no one can be astonished if the court should have made every endeavor to uphold it so far as it could in accordance with law, for one must feel distressed at the result that the disposition of her property which this lady intended to make must depend upon the accident of putting a piece of blotting-paper a quarter of an inch higher or lower. But we have to consider here an enactment of a Statute, in which there is no elasticity; we are bound to say whether this particular will complied with the requirements of the Statute.

I think it did not, and our decision must be attended with the unhappy consequence that the clearly known and expressed intention of this lady with regard to her property must be set aside, and persons whom she clearly meant to benefit be deprived of all benefits under it.

The first point is what are we now, as a Court of Appeal, to assume to be the real facts of the case as shown by the evidence in the court below. If the learned President of the Probate Division had come to the conclusion from the evidence before him, and on seeing the witnesses, even if they had used the expressions which are now before us on paper, that in fact this lady did sign in the presence of these witnesses, I should not be inclined to disagree with his conclusion; or if he had found or collected from what the witnesses said, that they could not say whether the signature was or was not under the blotting-paper, and he had come to the conclusion that the signature was visible, and that what the lady said was "This is my will," I should have agreed. But I think that he must be taken to have come to the conclusion from the evidence, and the conclusion seems borne out by the appearance of the document itself, that the blotting-paper was so placed that the witnesses not only did not but could not see the signature. If then they did not and could not see the signature, did this lady say "This is my whim," or "This is my will"? I shall assume, as being against rank absurdity, that she said "This is my will." The question then raised is whether it is a compliance with the Statute, if a testatrix, when two witnesses are present for the purpose of attesting a document, should say in their presence "This document is my will," whether that is a sufficient acknowledgment if at the time the witnesses did not and could not see the signature. That is a point of law, and on this point we must give our judgment. It is a point which must be decided upon

the Statute itself, and even if twenty cases decided that it would be a sufficient acknowledgment, if we were clearly of opinion that according to the true construction of the Statute it would not do, we should not be bound by those cases. Where there have been several decisions or a series of decisions upon any Statute, I should dread to overrule those decisions or that series of decisions, but still we should be compelled so to do if we thought that those decisions were not in accordance with the Statute. But in this case we have no long line of decisions one way; there seem to be conflicting decisions, and we must accordingly exercise our own judgment on the question independently almost, if not quite, of every former decision.

It is clear that *Hudson v. Parker* dealt exhaustively with the very point, and the opinion of Dr. Lushington was that, whatever might be the case under the older Statute, on the Statute then before him, and which is now before us, where a will has not been signed by the testatrix in the presence of two witnesses, and where it is necessary therefore to rely on an acknowledgment under the Statute, then even though the signature be there, and whatever is done be done in the presence of two witnesses together at the same time, if they do not see or do not have the opportunity of seeing the signature, whatever the testator may say there is not an acknowledgment in the meaning of the words of the Statute. To make it such an acknowledgment they must see or have the opportunity of seeing the signature. That is the interpretation put by Dr. Lushington on the Statute, and by the course of reasoning with which I wish respectfully to express my full agreement, it seems obvious that where an acknowledgment has to be relied upon, the witnesses must see or have the opportunity of seeing the signature. When they are required to attest the signature, they must see or have the opportunity of seeing the person signing the document. The doctrine is the same where the testator has to acknowledge his signature. I must say that looking at the Statute alone, you can only get at this necessity from the meaning of "acknowledgment," not from the words "the witnesses shall attest," because it is not the signature they are to attest, but the will. The question turns on what is meant by acknowledgment.

When you find that in order to make the signature sufficient the witness must see the person sign, so when a signature is to be acknowledged they must see that there is a signature, and the testator must then in their presence say something equivalent to "That is my signature;" so that if they do not have the opportunity of seeing the signature, even if he say before them "My signature is in this instrument," that will not do. That I take to be the decision of *Hudson v. Parker*.

It is said that the case of *Gwillim v. Gwillim* before Sir C. Cresswell, and the case of *Beckett v. Howe* before Lord Penzance, are to the contrary. As to the latter case there is no doubt that it is — and so it has been held. It is said that Lord Penzance decided it on the

authority of *Gwillim v. Gwillim*, and that that case does not decide what his Lordship thought it did. As regards this proposition I feel very great difficulty. There has never been, certainly not in our time, so great a master of what I would call transparently lucid exposition as Sir C. Cresswell, and therefore when I find that learned judge saying this, "I am therefore at liberty to judge from the circumstances of this case, whether the name of the testator was on the will at the time of the attestation or not," I cannot bring my mind to think that the proposition which he thought he had to solve was not this, and this only, whether the signature was or not on the will at the time of the attestation. Moreover, if there is a judge who is less likely to make a mistake as to what another judge has said, that judge is Lord Penzance; a clearer mind does not exist: and, therefore, when he comes to the conclusion that Sir C. Cresswell meant what he says he meant, it strengthens my view as to the meaning of Sir C. Cresswell in that case. Therefore we are reduced to this misfortune in arriving at the conclusion we have come to, that we are differing from both those judges. It may be said that in *Gwillim v. Gwillim* the point was not raised or was not argued, and the case of *Hudson v. Parker* was not even cited—the argument went on another line—but I do think that Sir C. Cresswell did intend to lay down the proposition of law which Lord Penzance understood him to lay down.

But on mature consideration, all I can say is that I differ on this question from those judges, and I feel bound to say that when I do differ from two such judges, I entertain much more doubt as to the propriety of my decision than of theirs. But still it is our duty to decide to the best of our powers, and I am of opinion that, according to the true construction of this Statute, witnesses must see or have the opportunity of seeing the signature. It has been brought to this, where the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there and they see or have the opportunity of seeing it, then if the testator says this is my will, or words to that effect, that is sufficient acknowledgment, although he does not say this is my signature. I therefore think that this will cannot stand.

HOLKER, L. J. I also regret that the court is constrained to come to a conclusion which will invalidate the will, but the court must be relentless and must judge according to law and fact, without regarding the possible consequences of the decision it feels bound to give.

The appeal has been argued on two grounds, first that the evidence was not enough to show that the testatrix did not sign her will in the presence of two witnesses; and, secondly, that if she did not she acknowledged her signature before other witnesses.

The first ground was put forward by Dr. Deane rather on the suggestion of the court. The will is, upon the face of it, in due form; the lady who made the will was properly instructed as to what she had

to do; she knew that it was necessary to sign it before the witnesses, and that they should sign in her presence. The attesting clause was in proper form; it is said that all these matters being strictly correct, the maxim of law, *Omnia præsumuntur rite esse acta*, must apply. It is further said that the result should be the same, even though this finding would not be quite in accordance with the testimony of the witnesses. That might be the case if the witnesses who came forward to prove the will had been in doubt or could not remember whether they did or did not see the testatrix sign. The fact that everything appears to have been rightly done would entitle the court to come to the conclusion that they did in fact see her sign. But when you have to prove a will strictly, and if they both say, or one of them says, they did not see her sign, it is impossible to say that there is proof of due execution. Therefore, where, as here, one positively says that she did not see her sign, and the other doubts, it is clear that that kind of testimony is not sufficient to establish the validity of the will.

The other ground on which Dr. Deane relied was that there was here a sufficient acknowledgment of the signature of the testatrix to her will made to the two witnesses. Now we come upon the second ground, as to what the cases have decided. What sort of acknowledgment is enough? According to the Statute, the signature is to be made before two witnesses, or the signature is to be acknowledged before two witnesses. For what purpose? To enable them to testify to the signature or to the acknowledgment of the signature.

It is clear that good sense requires that the acknowledgment to which the witnesses are to bear testimony should be an acknowledgment of the signature seen or capable of being seen by the witnesses. Although the words of the Statute are, "such witnesses shall attest the will" and not "the signature," it seems to me that it comes to the same thing, for when the document is properly signed or acknowledged in the presence of the witnesses, it becomes a will. So to my mind, to bear testimony to a will is the same thing as to bear testimony to the signature.

That being so, it was decided in *Hudson v. Parker* that the true view of the section was that, to constitute an acknowledgment sufficient within the Statute, the witnesses must see, or be able to see, the signature of the testator, and if so, there is no such acknowledgment in the present case, because, as far as the evidence goes, the signature of this testatrix was carefully concealed. Certainly both witnesses did not see the signature. But putting that difficulty out of the way, I should think it was not enough to prove that the witnesses saw the signature, but they should also know what this document which is signed really is. But the evidence goes to this, that this lady never said, "This is my will." According to Susan Harradine she said, "We have all our little wishes, and this is one of mine." According to Ann Harradine she said, "It is a little whim of mine." To my mind it is not very extraordinary that this lady, getting these two servants

to attest, should not care particularly for them to know that this was her will, she might be afraid of exciting curiosity; and at any rate Ann says in her evidence that if she had said that it was her will, she would have taken more notice.

The testatrix does not say, so far as the evidence goes, that it is her will, she does not say even that her signature is under the blotting-paper, therefore even if *Hudson v. Parker* were out of the way, it would be a difficult thing to say that this signature was acknowledged in the presence of two witnesses. I am therefore of opinion that this decision of the President is right, and must be affirmed.

*Appeal dismissed, but under the circumstances costs of all parties ordered to be paid out of the estate.*¹

DAINTREE v. FASULO.

PROBATE DIVISION. 1888.

[Reported 13 P. D. 67.]

BUTT, J.² The first question I have to decide here is whether the will of the testatrix, Miss Mary Anne Hainworth, made on September 29, 1877, was duly executed. About this there is no contest; the parties are agreed, and the evidence of the witnesses called is sufficient to prove the due execution of the will. Having regard to all the circumstances, I have no hesitation in admitting the will to probate.

Then the material question of this case arises. The will having been made on September 29, 1877, there is a codicil materially affecting it, said to have been executed on March 18, 1886. Both documents, the will and the codicil, are informal. Both are in the handwriting of the testatrix and both are signed by her. It is clear that on the day of the attestation of the codicil, the testatrix produced it, and asked one of the two attesting witnesses, Miss Hepburn, to sign it and also to allow her servant to sign it. Miss Hepburn objected to bring her servant into the matter, and the other attesting witness, Miss Whymper, was called in or came in, and subscribed as an attesting witness. It does not appear that anything was said to either of the attesting witnesses by the testatrix to the effect that the paper in question was her will, or even that it was any sort of testamentary document. It does not appear that either of them was aware that it was a testamentary paper. Still they were asked to sign it, the first witness by the testatrix herself, and the second either by the testatrix herself or by Miss Hepburn, in her presence and hearing, which would be the same thing. They signed their names as witnesses, and it is a fact in the case that the word "witnesses" is written before the first of

¹ See *Matter of Mackay*, 110 N. Y. 611 (1888).

² Only the opinion is given.

the two names. Was the signature of the testatrix above the attestation written there at the time they signed? Neither of the attesting witnesses has been able to say positively that they saw it there, or that it was there, but I think there can be no doubt that it was there. We have then this state of things; the signature of the testatrix was there, visible and open to the attesting witnesses, if they had looked to see it, for there was no pretence of covering it up, and though they cannot say that it was written there in their presence, a fair inference is that it had been written there before they signed. Having regard to these facts, is the will valid? It was not, to use the words of the 9th section of the Act, "made by the testatrix in the presence of the two attesting witnesses," because the signature had been put on it before. Was it, then, "acknowledged in the presence of the two attesting witnesses," to use again the words of the Act; and upon that the question arises, What is an acknowledgment? The paper was produced with the testatrix's signature upon it, and the witnesses were asked to subscribe as witnesses. I think that is, as I have already said, a fair inference of fact. In substance it amounts to this, — Here is a paper signed by the testatrix. They are not told what it is, they are not told that it is a will or a testamentary paper, but they are asked to sign their names as witnesses. They do so. Is that a sufficient acknowledgment of the signature being the signature of the testatrix? I hold that it is, and I should have held so apart from any authorities, but the general tenor of the authorities which have been cited supports the proposition, which I hold to be a good one. I do not think that the case of *Blake v. Blake*, 7 P. D. 107, is any authority to the contrary, because the whole of the observations of the learned judge there were based on the facts of the case; a leading and prominent fact of the case being that the witnesses never could and never did see the signature of the testator. In *the Goods of Thompson*, 4 Notes of Cases, 643, decided by Sir H. Jenner Fust in 1846, is an authority in favor of Mr. Inderwick's contention, as I read it; a direct authority, because there, the signature of the testator had been affixed to the document before the attesting witness saw it, and there was no statement to that attesting witness as to the nature of the document or as to the testator's signature. All that was said was "sign the paper," and it was held that the circumstances amounted to a virtual or constructive acknowledgment by the testator. In *Pearson v. Pearson*, L. R. 2 P. & M. 451, Lord Penzance treats that decision as practically overruled by the Privy Council in *Ilott v. Genge*, 4 Moore, P. C. 265, because he says, after reviewing the cases, "I have come upon *Ilott v. Genge*, in which Sir H. Jenner Fust repeats the same observation: 'The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present Statute.' In that case there was an appeal to the Privy Council and their Lordships decided that even assuming a will which was signed by the deceased before the witness had been

called in, the mere circumstance of calling in the witnesses to sign, without giving them any explanation of the instrument they are asked to sign, does not amount to an acknowledgment of his signature by a testator. As the case of *Ilott v. Genge* was decided by a Court of Appeal it has set aside any observations not in accordance with it made in *In the Goods of Thompson*."

I do not quite understand what is meant by that. I doubt whether there is any observation of Sir H. Jenner Fust in *In the Goods of Thompson* which is inconsistent with the decision in *Ilott v. Genge*; but if there be I cannot help thinking that Lord Penzance had lost sight of what was the leading feature in *Ilott v. Genge*, but which did not exist in *In the Goods of Thompson*, viz., that the witnesses were not allowed to see the testator's signature, which was covered up. That made the whole difference between the two cases. Holding *Ilott v. Genge* to be good law, which of course I do, there is nothing in that case to affect the decision of Sir H. Jenner Fust. I do not agree with Lord Penzance that *In the Goods of Thompson* was overruled by *Ilott v. Genge*, and I consider myself at liberty to act upon it. The result is, that I shall pronounce for this codicil as well as the will, giving the costs of all parties out of the estate.

Bayford, Q. C. (*Barnard* with him), for the plaintiffs.

Inderwick, Q. C. (*Middleton* with him), *contra*.¹

2. ATTESTATION MUST FOLLOW THE ACT ATTESTED.

MOORE v. KING.

PREROGATIVE COURT OF CANTERBURY. 1842.

[Reported 3 Curt. 248.]

ROBERT KING died on the 16th of August, 1842. By his will, dated the 22d of March, 1841, he appointed C. H. Moore, and his brother E. R. King to be his executors, and named his said brother his residuary legatee.

On the 8th of August, 1842, the deceased, being confined to his bed by illness, requested his sister, Mrs. Coape, to bring him materials for writing, and upon her doing so, he wrote a codicil (A) in the presence of Mrs. Coape, and she, at his request, subscribed her name thereto in his presence; no other witness was present at the time.

On the 8th of August, 1842, Sir D. Davies, the medical attendant of the deceased, paid him a visit, on which occasion the deceased requested Mrs. Coape to give him the paper (A), and showing the same to Sir

¹ Publication is necessary under the statutes of some of the United States. See *Den d. Compton v. Milton*, 7 Halst. 70 (N. J. L. 1830); *Lewis v. Lewis*, 11 N. Y. 220 (1854); 1 Woerner, Amer. Law Adm. (2d ed.) § 40.

D. Davies, said, "This is a codicil to my will, signed by myself and by my sister, as you will see at the bottom of the paper, you will oblige me if you will also add your signature, two witnesses being necessary." Sir D. Davies thereupon placed the paper on a chest of drawers by the bedside of the deceased, and subscribed his name thereto, Mrs. Coape, standing beside him at the time, said, pointing to her name signed at the bottom of the paper, "There is my signature you see, you had better place yours underneath."

On the 7th of November, 1842, the court was moved to admit this paper (A) to probate, the court rejected the motion, and directed the paper to be propounded. An allegation was given in by the executor, Mr. Moore, propounding the paper, and was opposed by Mr. King the other executor and residuary legatee.

R. Phillimore opposed the admission of this allegation.

H. I. Nicholl, in support of the allegation.

SIR HERBERT JENNER FUST. The question before the court is one of great importance with regard to the construction of the Will Act (1 Vict. c. 26). It turns upon the due execution of a paper bequeathing personal property, which is now regulated by the same law as regulates the disposition of real property. The duty imposed upon the court is to find its way to a due and proper construction of the whole of the Act; not of one single isolated clause, but of the entire intention of the Legislature in passing the Act. This case must form a leading case of its class; two other cases, of a similar nature, have been brought before the court, but only on *ex parte* motion, unfortunately they were cases, where the property involved in the decision was so small, as to render them unable to bear the expense of litigating the point. As far as I am able to judge, the present case differs in some respects from both those cases. In the *Case of Allen*, 2 Curt. 331, the paper was attested by the one witness alone present on one day, the deceased having then signed it in her presence; on a subsequent day it was signed in the presence of a second witness, and attested by that witness in the presence of the first, but the first witness was not called on to attest the second execution. The court was of opinion that the execution was not sufficient. The other case of *In re Simmonds*, 3 Curt. 79, was very similar. In this case, as has been observed, there is this material distinction; the deceased having in the first instance signed the paper in the presence of his sister alone, does on a subsequent day acknowledge his signature in the presence of his sister, and his sister pointed out her signature to the second witness, but I do not understand, that the deceased desired her to re-attest the acknowledgment of his signature. I admit all that has been said as to the construction of Statutes, and the interpretation put upon the Statute of Frauds as to signing by the testator, but is the same interpretation applicable to the subscription of the witnesses? It has been argued, under the present Statute, as against the admission of this allegation, that although this might have been a good subscription under the Statute

of Frauds, it is not sufficient under the altered language of the present Act; on the other side, it has been said, that a construction is to be put on this Act the same as if on the Statute of Frauds; but it must be remembered, that the doubts, expressed by judges of courts of law and equity on the Statute of Frauds, led to the introduction of the present Act. It has been well said, that the 1 Vict. c. 26, is not an original Act, but an Act to amend a former law; so it is, — it is an Act to amend a former law, for removing all doubts whatever existing with regard to that law, and I find in the 9th section of the new Act, a considerable departure from the language of the corresponding section (5th) of the Statute of Frauds. The language of the 9th section of 1 Vict. is expressly prohibitory, “No will shall be valid unless it be in writing, and signed at the foot or end thereof,” — clearly thereby intending to remove all doubts, in regard to the construction of the Statute of Frauds, as to signing by putting the testator’s name at the beginning of the will; — “and such signature shall be made or acknowledged by the testator,” — it had been formerly doubted, under the Statute of Frauds, whether an acknowledgment of the signature was sufficient, whether the will must not be actually signed in the presence of the witnesses; here again, all doubt is removed by the present section. Under the Statute of Frauds it had been held, that the witnesses need not be all present at the same time, the signature might be acknowledged to the three or more witnesses at different times; — again, by the present Act, all doubt on that point is removed, the witnesses must be present “at the same time.” Now when I clearly find, that the object of this Act is to remove every possible doubt, — thereby taking away all latitude and discretion in its interpretation, — and that it expressly provides that the two witnesses, who *are to be present at the same time*, shall attest and subscribe, can I hold that the one may attest and subscribe on one day, and acknowledge his or her signature on a subsequent day? I am inclined to think that the Act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator’s signature shall have been made and acknowledged to them when *both* are actually present at the same time. If the one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence, and in that of the other witness which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not re-subscribe. The Act says the testator may *acknowledge* his signature, but does not say that the witnesses may acknowledge their subscriptions. I reject the allegation.

HINDMARSH v. CHARLTON.

HOUSE OF LORDS. 1861.

[Reported 8 H. L. C. 160.]

THE respondent had instituted a suit in the Probate Court against the present appellant, for the purpose of obtaining letters of administration of the personal estate of Joseph Hindmarsh, deceased, who died on the 26th December, 1857, leaving her, his sister (married to Thomas Charlton) his next of kin. She alleged that her brother died intestate. The appellant pleaded that the brother did not die intestate, but on the 17th of December, 1857, made and duly executed a will, under which the appellant claimed as residuary legatee. The parties being thus at issue, the Court of Probate made an order for trial, and the issue came on for trial at the Durham Spring Assizes in 1859, before *Mr. Justice Byles*; when, under the direction of the learned judge, the jury returned a verdict for the defendant, declaring the will to have been duly executed, but leave was reserved to the Court of Probate to enter the verdict for the plaintiff in the suit, that court being at liberty to draw inferences of fact, if it should think fit to do so. A motion for that purpose was accordingly made before the Judge Ordinary. The notes of the evidence taken at the trial were furnished by Mr. Justice Byles, and were to the following effect: Dr. Blair White, a physician at Newcastle, said, "I attended Joseph Hindmarsh. On the 17th December, 1857, I went into Hindmarsh's bedroom; two papers were produced by the housekeeper in the presence of Hindmarsh. Mr. Wilson, the other medical attendant, was present. I gave the papers into Hindmarsh's hands, and asked, if that was his signature. Hindmarsh put on his spectacles, examined the paper and the signature, and said, 'Most decidedly this is my handwriting, and this is my will.' This was in the presence of Mr. Wilson and myself. I took the will from Hindmarsh's hand and signed it in that room. I remember Mr. Wilson signing the date, because I requested him to do so." Mr. Frederick William Napoleon Wilson, surgeon, said, "On the forenoon of the 17th December, 1857, I saw Mr. Hindmarsh. I was asked by him to sign his will as a witness, and the will was brought out, both parts. He looked at it, and said that was his will. I wrote at the bottom, 'Witness to the above will and testament and signature,' and then my name, 'Fred. Wm. Nap. Wilson,' on both papers. In the afternoon, Dr. White came. In the room Dr. White examined the patient as to his health. The doctor and I then went into the other room, where we had a consultation. I had suggested to Hindmarsh before we left the room, that he had better have another witness. Dr. White took the will in his hand, and we went back to the room where Hindmarsh was. Dr. White asked Hindmarsh if that was his will. He said, 'Well, I can't see very well, get me my spectacles.' The housekeeper gave him his spectacles, and he sat up in the bed, and looked

at the paper, and said, 'Yes, that is my will, and this is my signature.' At a small table, at the head of the bed, and close to the bed, Dr. White signed his name. After he had signed it, I took the papers and went across to the window, where there was another table, and sat down in an arm-chair; and then, after some conversation about the date being added, I distinctly remember retouching my name, by putting a cross on the *F* on the paper which is uppermost, and then I added the date in both wills, and then, I believe, the documents were both given to the housekeeper." On cross-examination, he said, "I very often omit to put a cross at all, and where I find it has not been done I always put it. I had noticed the omission of the cross. I had always been in the habit of supplying the omission. This was merely in pursuance of my habit. . . . I thought it was better to complete the name. I thought adding the date was equal to a repetition of the signature. I think I had no other intention. It was by the date I intended to repeat my signature. My sole object was to supply the omission, to make the name complete. I was attesting the will, and I thought it necessary to have a complete signature. My object was to make the signature of the morning complete."

The cause was heard before the Judge Ordinary, and on the 18th May, 1858, judgment was pronounced in favor of the plaintiff in the suit, on the ground that the facts proved did not amount to a due attestation of the will according to the provisions of the 1 Vict. c. 26. The verdict for the defendant was, therefore, ordered to be set aside, and a verdict entered for the plaintiff. This was an appeal against that decision.

Mr. Manisty and *Mr. Heath*, for the appellant.

The Solicitor-General (Sir W. Atherton) and *Dr. Spinks*, for the respondent.

THE LORD CHANCELLOR. [LORD CAMPBELL.] My Lords, these are very distressing cases for judges to determine. I may honestly say that we have a strong inclination in our minds to support the validity of the will in dispute, which the parties *bona fide* made, as they believed, according to law, and where there is not the smallest suspicion in the circumstances of the case. But we must obey the directions of the Legislature, and we are not at liberty to introduce nice distinctions which may bring about great uncertainty and confusion. Having heard the case very lucidly and ably argued on both sides, I am of opinion that the learned judge of the court below came to a right conclusion in holding that this will was not made in accordance with the requirements of the Legislature.

The Act of the 1 Vict. c. 26, § 9, requires that a will to be valid "shall be signed at the foot, or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator."

It is settled by the case of *White v. The British Museum*, 6 Bing. 310. and other decisions to the same effect, that after the will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. The question in this case is, whether that which took place was a subscription of the witnesses, whose subscription is in question, or not. I will lay down this as my notion of the law: that to make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter *F* in the same manner as if he had perfected the letter *i* by putting a dot over it, which he had not dotted in the morning. Now, can that be considered as amounting to a subscription? It was an acknowledgment by him of his former signature written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the bar, there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient; but this does not, in my opinion, amount to a subscription, because whether the *i* was dotted, or the horizontal stroke was put to the *F*, to perfect the word, it was not intended that either the dot or the horizontal stroke should represent the name; the name was written in the morning, and that would continue both till and after the evening, as the subscription of the witness.

I regret very much that we are compelled to hold this instrument to be an invalid will, but we are constrained so to do by the Act of Parliament; and therefore I must advise your Lordships that this appeal be dismissed.

LORD CRANWORTH. I concur with my noble and learned friend in having a sort of personal feeling of regret that this will cannot be sustained as a valid will. It appears to be a reasonable will, and a will as to which there is not the least suspicion of anything like fraud or imposition. But for the security of mankind, the Legislature has thought fit to prescribe certain forms and rules which are necessary to be complied with, in order to authorize a distribution of property, different from that which the law would make if there was no will; the Legislature, in truth, on these forms being complied with, putting into the hands of the party who is making a will, power to dispose of his property in a way contrary to what, but for the will, would be the provision of the law. That it is reasonable that, under these circumstances, there should be some rules to be acted upon, no one can doubt; and those rules being established, this House, as the ultimate court of appeal, would be, I think, ill discharging its duty to the public if it were to listen to suggestions of minute differences which would not

meet the ordinary apprehensions of mankind, and which would necessarily or naturally lead to great discussion and litigation.

It has been determined, upon the construction of the last Statute, and quite rightly determined, that there must be a subscription by two witnesses after the testator has signed the will in their presence, or acknowledged his signature in their presence. In this case, the testator acknowledged his signature in the presence of two witnesses, but it is certain that there was not here a subscription, after the testator had so acknowledged the will, by Mr. Wilson, one of the witnesses, unless his putting a mark across the letter *F* (or *T* as it would have stood without the cross) amounts to a signature by him. Upon that subject, I entirely concur with my noble and learned friend, for I do not think that you could suppose anything so absurd as that when he wrote the words Frederick William Napoleon Wilson in the morning, he did not mean that to be his signature, but that he intended the mark, which he afterwards put, to be his signature; but unless you suppose that, there was no subscription by Mr. Wilson after the acknowledgment by the testator, in the presence of two witnesses, that that was his will. His putting the cross to the letter *F* in the afternoon cannot be said to be his subscription. The acknowledgment of his signature by a testator is sufficient, but a witness stands in a different position. After the signature of the will by the testator his acknowledgment will do; but by the express terms of the Statute, that will not do with regard to the witness. If he had said nothing at all, the putting a mark across the *F* might have amounted to an acknowledgment of his signature; but that will not do, and yet the facts here cannot amount to more than that.

Upon these short grounds, for the case lies within a very narrow compass, I concur with my noble and learned friend, that this instrument cannot be taken to be a will duly executed by this alleged testator.

LORD CHELMSFORD. I regret to have to agree with my two noble and learned friends, that the will was not duly executed, as required by 1 Vict. c. 26. To render a will valid, the signature or acknowledgment of the testator must be in the presence of two witnesses, present at the time, and the witnesses must attest and subscribe the will in the presence of the testator. Now, upon witnessing the will in the forenoon of the day of its execution, Mr. Wilson subscribed his name, intending that it should be a complete signature. It was, of course, insufficient as a complete subscription under the Act, because only one witness was present, and if it had been left without anything more having been done by Mr. Wilson, no question of the imperfect attestation and subscription of the will could possibly have existed. And the question is, whether what was done in the afternoon, when a second witness was present, would make a complete attestation and subscription.

Mr. Wilson certainly intended to subscribe as a witness in the afternoon. But he thought that adding the date was equivalent to a

repetition of the signature. Did this amount to a second subscription? Suppose Mr. Wilson had not subscribed his name in the morning, and in the afternoon had merely put the date, could that have been considered to be such a subscription as the Act requires? The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the full name; and if the date alone would not do, of what efficacy can it be towards completing the subscription?

If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act. For there would really have been only one complete subscription. But the omission of the cross to the *F* in his Christian name, did not make the signature imperfect. For Mr. Wilson states, that he very often omitted to put the cross at all; and he did not add the cross to complete his signature, so as virtually to subscribe anew, but merely in pursuance of his habit of supplying the omission when he noticed it.

The words of the Act appear to me to be quite clear in prescribing what shall be necessary to render a will valid. And of course no equivalent can be substituted for its plain requisitions. However much, therefore, we may regret that the will of the testator should be disappointed by an accidental omission, where all parties intended to comply with the directions of the Act, yet we are bound by the express and clear language of the Legislature; and, however reluctantly, we are compelled to pronounce the will to be invalid.

THE LORD CHANCELLOR. The appeal will be dismissed without costs.

Decree affirmed, and appeal dismissed without costs.

LACEY v. DOBBS.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1901.

[Reported 68 N. J. Eq. 325.]

ON appeal from a decree of the prerogative court affirming the probate, in Essex county orphans court, of the will of Mary Ann Caldwell. The opinion of the ordinary is reported in 16 Dick. Ch. Rep. 575.

Mr. Addison Ely and *Mr. William H. Ely* (of the New York bar), for the appellants.

Mr. Alexander Grant and *Mr. Harry F. Barrell*, for the respondent.

The opinion of the court was delivered by

COLLINS, J. The orphans court of Essex county admitted to probate as the last will and testament of Mary Ann Caldwell, deceased, a paper-writing, her signature to which was proved to have been made

after the subscription of the putative testamentary witnesses, although on the same occasion and while they were still present.

Upon affirmance in the prerogative court, by the decree that is the subject of the present appeal, the learned chancellor, sitting as ordinary, was largely influenced, if not controlled, by a deliverance in that court in 1858, in the case of *Mundy v. Mundy*, 2 McCart. 290, to the effect that the order of signing was not material to the validity of a will. The question has been directly involved in no other reported case in this state.

The first section of the supplement, approved March 12th, 1851, to "An act concerning wills" (Gen. Stat. p. 3760), upon which all valid wills must rest, reads as follows :

"All wills and testaments of persons dying after this act shall take effect, or who may have died since the fourth day of July, in the year of our Lord eighteen hundred and fifty, shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator; and all wills and testaments of persons dying since the day above mentioned, made in manner prescribed, by any person competent by law to make such will, shall be sufficient to devise, pass and bequeath all estates and property, real or personal, and all rights of any kind, and to appoint a guardian or guardians to any child of the testator during infancy."

The grammatical sense of this enactment is that the entire testamentary act is to be attested by two witnesses, by the subscription of their names. They are to subscribe "*as witnesses*" — i. e., as those who know (Saxon witan) what was said and done. They cannot know before the fact. But the apparent meaning of words must yield to authoritative judicial construction; and a judgment of the prerogative court, of long standing, although not binding in this court, should not lightly be overruled. Hence some elaboration seems proper in vindicating a determination contrary to the deliverance mentioned — the more so because of confusing adjudications elsewhere.

It will be found upon examination of the case cited that such deliverance was an ill-considered make-weight for a decision previously placed on a sound basis with which it was really inconsistent. The decree was mainly and rightly vested on the evidential force of the attestation signed by the testamentary witnesses. It was said: "The attestation clause, with the signatures of the witnesses, is *prima facie* evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. If there is no attestation clause the case is different. In the one case there must be affirmative proof of publication and of the other requisites; in the other there must be affirmative proof of the want of those requirements." In *Allaire v. Allaire*, 8 Vr.

312, the present chief-justice, speaking for the supreme court, said that the true principle had been so declared with exactness; and in *Allaire v. Allaire*, 10 Vr. 113, this court held that the legal rule was thus properly settled. But not content with this firm ground of decision, the learned ordinary, evidently without scrutiny of the statute, and without that careful consideration almost always displayed in his judicial utterances, went on thus to support it: "Mrs. Manning at one time says that she thinks her husband [one of the testamentary witnesses] signed before the testator. If the fact was clearly proved, it would not affect the validity of the will. The particular order of the several requisites to the valid execution of a testament is not at all material. *Vaughan v. Burford*, 3 Bradf. Surr. 78." This is most unsatisfactory. The order of the requisites to the execution of a will is not material. The testator may declare the "writing" to be his will before or after or contemporaneously with the making or acknowledging of the signature, but attestation is a different matter. Of course the word "execution" was used — though inaptly — to include the subscription of the witnesses, and the New York surrogate's decision, on which too hasty reliance was placed, was to the effect stated, upon a New York statute like our own. That decision has since been repudiated by the court of appeals, and it is strange that so acute a reasoner as the writer of the opinion in *Mundy v. Mundy* should not have seen the inconsistency of antecedent subscription of witnesses with his declared rule that "the attestation clause, with the signature of witnesses, is *prima facie* evidence of the facts stated in it." One of those facts must be the making or acknowledging of the testator's signature. The attestation clause, he had said, can only be overcome by proof irreconcilable with its verity. When signed, therefore, in order to have such a probative force it must be true. The rule necessarily interprets the statute.

The rationale of the rule was very clearly stated by Vice-Ordinary Van Fleet in *Farley v. Furley*, 5 Dick. Ch. Rep. 434, 439. He said that an attestation clause is "for the very purpose of preserving in permanent form a record of the facts attending the execution of the will, so that, in case of the failure of memory, or other casualty, they may still be proved. It is for this reason that the courts have uniformly held that, on proof of the authenticity of the signatures of the subscribing witnesses, the facts stated in the attestation clause must be considered and accepted as true until it is shown by affirmative proof that they are not." The late chancellor, sitting as ordinary, in *Darnell v. Buzby*, 5 Dick. Ch. Rep. 725, 727, tersely said: "The attestation clause recites particulars which assert complete obedience to all the requirements of the statute, and the signature of the witnesses being admitted, that clause makes *prima facie* proof of all the facts stated in it."

If it be urged, as indeed it has been in some of the cases, that the legal presumption raised by the attestation clause is an arbitrary one, because the witness first subscribing cannot, in the nature of things,

attest that the other subscribes in the testator's presence, the answer is that, in this regard, all that is required by the statute is that each witness shall so subscribe. The attestation is not joint, but several, and the witness subscribing does not attest the signature, but only the presence of his colleague.

To the argument that, as like effect is given to an attestation clause by those courts that hold the order of signing to be immaterial, it is at least disputable that such rule of evidence is inconsistent with that laxity, it is sufficient to reply that in any case all that need be attested is that for which the particular statute involved requires the presence of witnesses, and that no court has yet held that attestation can precede the testator's signature where the statute construed requires, in terms, as does ours, the making or acknowledging of such signature to be in the presence of the testamentary witnesses.

Before proceeding to consider direct adjudications on the question *sub judice*, it will be necessary to present the state of the law on the subject of wills at the time of the enactment of our present statute.

Testaments of personalty were, in England, until the reign of Victoria, left to the ecclesiastical courts unaffected by legislation. Devises of lands were *sub temp.* Hen. VIII. required, by act of parliament, to be in writing, but no formalities or attestation were prescribed. The statute of frauds of 29 Car. II. c. 3 § 5, provided that such devises "shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect."

This statute inherently prevailed or was, in substance, enacted in the American colonies and the states of the union, many of whom extended its provisions to testaments of personalty. In New Jersey a change, in phraseology at least, was made. In 1713-1714 it was enacted that "all wills and testaments which hereafter shall be made in writing, signed and published by the testator in presence of three subscribing witnesses and regularly proved, &c., . . . shall be deemed sufficient to devise lands." Allin. L. p. 27.

This statute survived the Revolution. In *Compton v. Mitton*, 7 Halst. 70, decided in 1827, Chief Justice Ewing called attention to the difference between it and the English statute of frauds. He said: "Under both, wills are to be in writing, to be signed and have at least three witnesses. Our act requires the will to be published, which is not expressly directed by the other. By the English statute the will is to be signed. By our act the will is to be signed and published in the presence of witnesses. By the former the witnesses are to attest and subscribe in the presence of the devisor. By the latter they are not, in terms, required so to do, although it is our usual and commendable custom."

Like other provisions of the statute of frauds, its fifth section was very loosely construed, and to remove the consequent uncertainty, as well as to bring testaments of personalty into uniformity with devises of land, "An act for the amendment of the laws with respect to wills" was passed by parliament, taking effect on July 3d, 1837. 1 Vict. c. 26. By section 9 it was enacted that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This statute soon came before the ecclesiastical courts, and in 1842 was carefully considered by Sir Herbert Jenner-Fust in the prerogative court of Canterbury. *Moore v. King*, 3 Curt. 243. The great importance of the case as a leading one was perceived and expressed—the previous interpretations, though of the same tenor, having been *ex parte*. *Re Goods of Olding*, 2 Curt. 865; *Re Goods of Byrd*, 3 Curt. 117. These were the facts: The testator signed the draft of his will in the presence of his sister, who subscribed her name as a witness. On the next day he acknowledged his signature, in her presence and in the presence of another person, to whom the sister pointed out her signature, and who then subscribed as a witness. The will was held invalid for lack of conformity to the statute. It was observed that the new legislation was amendatory, and, in fact, had grown out of the loose construction that had been given to the statute of frauds, and the judge said: "I clearly find that the object of this act is to remove every possible doubt, thereby taking away all latitude and discretion in its interpretation." He declared his opinion that "the act is not complied with unless both witnesses shall attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when both are actually present at the same time." He pointed out that the alternative of acknowledgment of the testator's signature, expressly given by the act, precludes any implication that the witnesses might acknowledge their signatures previously made. The same learned judge reaffirmed his opinion the next year, in *Cooper v. Bockett*, 3 Curt. 648, in a case where the testator signed on the same occasion as the witnesses, but after they had signed.

No English court has ever held that the statute of frauds permitted subscription of testamentary witnesses in advance of the testator's signature. When parliament passed the amendatory act such an anomaly had never, in any adjudged case, been presented or suggested. But in this country, before the New Jersey legislature acted finally in the premises, the subject had been judicially considered. In Kentucky, the statute of 1797 required that wills should be "signed by the testator or testatrix or by some other person in his or her presence and by

his or her direction; and, moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses subscribing their names in his or her presence."

A will was drawn for a testator, and while still unsigned by him, was subscribed in his presence by two persons as if witnesses. Some hours later he signed it in their presence and in the presence of a third witness, who subscribed it, the first two, at the same time, acknowledging their subscription. In 1840 this will was established as valid by the supreme court of the state. *Swift v. Wiley*, 1 B. Mon. 114. A distinction was drawn between attestation and subscription. The judge said that subscription was required "for the sole purpose of identification." This was a misconception, for attestation of a will involves subscription, and there is a better argument in favor of the decision which I will later suggest. Under a statute practically identical with that of Kentucky, the supreme court of appeals of Virginia in 1849 held, *obiter*, that the order of signing as between testator and witnesses was not material. *Rosser v. Franklin*, 6 Gratt. 1. The signature of an illiterate testatrix had been written for her before the witnesses subscribed and the occasion of the *dictum* was her subsequently making her mark.

It will be observed that neither in the English statute of frauds nor in these American derivatives is it required that the testator's *signature* shall be made or acknowledged in the presence of the witnesses, and that under each statute it is the *will* that is the written disposition of the testator's property — not its due execution, that, in terms, is to be attested. It is consistent with such legislation that the writing shall be declared to be the will of the testator, although his signature be not shown to the witnesses; and if, when probate is moved or the will in anywise comes in controversy, the true signature of the testator appears upon the attested document it may be fairly arguable there has been compliance with the law. In the old case of *Peate v. Ogely*, Com. 197, a jury was permitted to inquire of the due execution of a will which was so folded when the witnesses subscribed it that they could not know whether or not it was signed, and a verdict for the will was sustained. This would have been impossible under 1 Vict. c. 26, and the precise case did, in fact, in 1844, arise under that statute. *Hudson v. Parker*, 1 Rob. Eccl. 14. The proof was that the witnesses had subscribed, in presence of an ostensible testator and each other, a paper on which the writing was concealed. The testator said it was his will, but did not show any signature. After his death his proper signature appeared at the end of the paper. Dr. Lushington, in an elaborate opinion distinguishing the Victorian statute from the statute of frauds, held the paper invalid as a will.

In this situation and with the same purposes that moved the British parliament in 1837, the New Jersey legislature proceeded to deal with the general subject of wills. By an act approved March 7th, 1850 (P. L. of 1850 p. 280), it was provided that "all last wills and testa-

ments of persons dying after this act shall take effect shall be in writing and shall be signed or acknowledged to have been signed by the testator and declared to be his or her last will in the presence of at least two credible witnesses, present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." A year later the statute first above quoted and still extant was substituted. The main purpose of the change was to more clearly express the requirement that the *signature* of the testator must be made or acknowledged by him in the presence of the witnesses, and to declare in terms that the provisions of the act should extend to personal as well as real estate. The substantial identity of much of the language used with that of the English statute of 1837 makes it indisputable that the one was the model for the other. Ours is the more stringent, if there be any difference in the forms of expression. I will not say that the interpretation of the English courts of several years' standing at the time of New Jersey's adoption of the English act should be read into our statute; it is enough to say that such interpretation is highly persuasive. The previous rendition of the Kentucky and Virginia decisions furnishes another argument in that direction. It should not be lost sight of that since 1714 our law had required wills devising lands to be *signed* as well as published in presence of *subscribing* witnesses. In that respect the new statute was an enlargement, for it permitted a signature previously made to be acknowledged by the testator.

It was suggested by the learned ordinary in the court below, in this case, that there may be a difference in the effect of the two amendatory statutes, in that the English one does, while ours does not, require the witnesses to attest as well as to subscribe the will. It being expressly provided in the English act that no *form* of attestation shall be necessary, it is evident that what is meant is that the witnesses shall subscribe "*as witnesses*," which is the concise direction of our act, accordant with the usual definition by lexicographers of the word "attest" as applied to writings.

All the later English cases approve the view of Sir Herbert Jenner-Fust. It is unnecessary to cite them. The question finally reached the house of lords in 1861, and was there definitely settled in *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, affirming Sir Creswell Creswell, in the new court of probate and divorce. *Charlton v. Hindmarsh*, 1 Swab. & T. 433. Briefly stated, the case was this: Hindmarsh produced to Dr. Wilson, a surgeon attending him in illness, a paper-writing, which he then signed and said was his will, and asked the surgeon to subscribe as a witness. Dr. Wilson wrote "witness to the above will and testament, and signature," and signed his name, inadvertently omitting to cross a capital F, so that it stood as a T. Later in the day Dr. White, the physician in regular attendance, called, and there was a medical consultation. Dr. Wilson had previously told Hindmarsh that there ought to be another witness to the

will, and, after the consultation, both doctors went into the sick-room, taking it with them. Hindmarsh then acknowledged his signature and Dr. White subscribed his name as a witness. Dr. Wilson, noticing that the F in his name lacked a cross, supplied one, and, at Dr. White's suggestion, added the date. It was held that, in order to comply with the statute, "the signature or acknowledgment of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed, or so acknowledged, his signature, subscribe the will in his presence;" and that a correction of an error in a previous writing of the name of a witness, or his acknowledgment of his signature, or the adding of a date, will not be sufficient. The lord-chancellor (Campbell) and Lords Cranworth and Chelmsford gave concurring opinions, each expressing regret that the stability of the law required the court to deny effect to a meritorious disposition of property in a case where there was a plain, but abortive, attempt to comply therewith.

The American decisions defending subscription by testamentary witnesses in advance of a signing by or for the testator that have been rendered since the enactment of the New Jersey statute of 1851 rest on legislation much less restrictive than that. In *Miller v. McNeill*, 35 Pa. St. 217, often cited, what was said on the subject was entirely gratuitous, for, under the Pennsylvania statutes, such subscription is supererogatory. *Hight v. Wilson*, 1 Dall. 94; *Rohrer v. Stehman*, 1 Watts, 463; *Frew v. Clarke*, 80 Pa. St. 170, 178. The act requires only that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; and otherwise shall be of no effect."

Of course, persons actually witnessing the testamentary act are not debarred from proving it by having prematurely subscribed their names to the will. In the case cited, Woodward, J., said: "Our statute contemplates, undoubtedly, a signing by testator, and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment, and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? The execution and attestation of the will were concurrent, or rather simultaneous acts and we will not regard the question of who held the pen first, the testator or his witnesses." I have quoted this *dictum* because it carries its own refutation and makes strongly for the contrary decision where a statute not only "contemplates," but *directs* an orderly succession of acts.

The other cases are four in number, viz., *O'Brien v. Gallagher*, 25 Conn. 229; *Moale v. Cutting*, 59 Md. 510; *Kaufman v. Caughman*, 49 So. Car. 159, and *Gibson v. Nelson*, 181 Ill. 122.

Except as to Illinois, all the statutes involved closely follow the language of the English statute of frauds; in those of Connecticut and South Carolina there being the additional requirement that the witnesses shall subscribe in the presence of each other. These cases are not helpful in interpreting our statute, and indeed, in the South Carolina case, the learned judge rests the court's decision on the elasticity of the statutes construed. After noticing that, under 1 Vict. c. 26, the English courts hold that the signature, or acknowledgment of signature, of the testator must precede subscription by the witnesses, he justifies that interpretation of the act, although he thinks it a strict one, on the ground that it is such *signature* that the witnesses are to attest. He says that the English act clearly places more stress than that of South Carolina on the mere manner of executing wills, and he concludes: "When the statute expressly or by necessary inference requires such formalities, then nothing is left but to enforce it; but the court will not stress formalities which the statute does not." In Maryland, also, the court, in an earlier decision, declaring that, in that state, testamentary witnesses need not subscribe the will in presence of each other, had called attention to the fact of the essential differences between the statute of frauds (of which it was said the Maryland act was a copy) and the Victorian statute, as pointed out by Sir Herbert Jenner-Fust.

The Illinois statute is unique. It enacts that "all wills, testaments and codicils . . . shall be reduced to writing and signed by the testator or testatrix or by some person in his or her presence, and by his or her direction and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign the said will, testament or codicil in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of such will, testament or codicil to admit the same to record; provided, that no proof of fraud," &c.

Plainly it is the will, not the signature or its acknowledgment, that is to be attested, and the supreme court of the state, in *Hobart v. Hobart*, 154 Ill. 610, has held that where a testator does not sign in presence of the witnesses it is not necessary for him to acknowledge in their presence a signature previously made, the words "the same," twice occurring in the statute, in the opinion of the court, referring back to "said will;" and while, in *Gibson v. Nelson*, *ubi supra*, the same court, solely on the authority of *O'Brien v. Gallagher*, *Rosser v. Franklin* and *Miller v. McNeil*, *ubi supra*, did hold the order of signing immaterial, it indulged in reasoning that destroyed the force of its decision—if the statute requires attestation of signature—by declaring that "undoubtedly the proper order is for the testator to sign first, for after the witnesses had signed, he might never sign, or

might sign on some other occasion, or out of their presence, which would not be a compliance with the statute."

I do not concede that the American cases were rightly decided. I very much doubt if the English courts would have so construed their basic legislation. In *Peate v. Ougly*, *ubi supra*, the verdict was justified only on the assumption that the jury found that there was execution before attestation. In *Windham v. Chetwynd*, 1 Burr. 414, 421, Lord Mansfield seems to imply such a necessity, while in *Roberts v. Phillips*, 4 El. & B. 450, 459, Campbell (then lord chief-justice) assumes it in upholding as valid a subscription by the witnesses at a place other than the foot of a will made in 1828. He says: "The mere requisition that the will shall be *subscribed* by the witnesses we think is complied with by the witnesses who saw it executed by the testator immediately signing their names on any part of it, at his request, with the intention of attesting it." In this country the courts of five states have interpreted enactments copied from the statute of frauds as requiring signature by or for the testator before there can be subscription, in attestation, by the witnesses. In North Carolina this occurred in 1841 (*Ragland v. Huntingdon*, 1 Ired. L. 561); followed in 1854 (*In re Cox's Will*, 1 Jones L. 321); but the first adequate treatment of the subject was in 1865, by Gray, J., in the Massachusetts supreme court, in *Chase v. Kittredge*, 11 Allen 49. With a wealth of erudition and argument he demonstrated, both on authority and principle, that attestation cannot precede execution of a will. The Massachusetts statute, enacted in 1836, as quoted in the report, was as follows:

"No will (excepting nuncupative wills) shall be effectual to pass any estate, whether real or personal nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed, in the presence of the testator, by three or more competent witnesses."

On the point in question the learned judge saw no difference between the statutes of Charles and Victoria, and he accepts the English decision culminating in *Hindmarsh v. Charlton*, *ubi supra*, as authoritative and coincident with the reason of the case. He assumes indeed, as did the Kentucky court, that attestation and subscription are separate acts, but only to insist the more strongly that subscription by the witnesses, which he says is "in proof of" their attestation, must be the final act in the series essential to a valid will. No judge differing in opinion has attempted to answer the argument of Judge Gray, though several have ignored the decision as authoritative except where, as in the case decided, a necessary witness had subscribed the will in the absence of the testator. In a very recent decision the supreme court of Massachusetts has adopted Judge Gray's opinion in a case directly in point, and, as compactly stated in the head-note, has held that "witnesses to a will must sign after the testator has signed." *Marshall v. Mason*, 176 Mass. 216 (1900). *Chase v.*

Kittredge was approved and followed, in 1867, in Indiana, where Chief-Justice Elliott says that the statute is substantially the same as 29 Car. II. c. 3 § 5, except that the English act related only to devises and required three or four, instead of two or more, subscribing witnesses. *Reed v. Watson*, 27 Ind. 443. In Georgia, in 1869, it was held that, under a like statute, subscription of witnesses could not be vivified by acknowledgment after a signing by the testator on the following day (*Duffie v. Corridon*, 40 Ga. 122), and in 1891 it was directly held, in an opinion by Chief-Justice Bleckly, that "the witnesses to a will must subscribe their names as witnesses after the will is signed by the testator — there being nothing to attest until his signature has been annexed. It makes no difference that the signing and attestation are each a part of one and the same transaction." *Brooks v. Woodson*, 87 Ga. 379. A concise, but comprehensive, note by the reporter classifies the decisions on the general subject, including some that are merely cognate to the questions involved. The annotation to this case, as reported in 14 L. R. A. 160, may also be consulted with profit. The fifth state is Texas, where the ruling, though postulated for a decision of the tenor of *Roberts v. Phillips*, *ubi supra*, is positive and unequivocal. *Fowler v. Stagner*, 55 Tex. 393.

It appears, therefore, that even under statutes not, in terms, requiring a testator's signature, but only his declared written will, to be attested, very weighty judicial opinion repudiates the idea that there can be attestation before signature. In no case has it been held that, where there is that requirement, subscription of witness can precede such signature. The only state having that statutory requirement, the courts of which have had occasion directly to deal with it, is the State of New York. There the statute, since January 1st, 1830, has read as follows:

"Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: (1) It shall be subscribed by the testator at the end of the will. (2) Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. (3) The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament, and (4) there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator." 2 Rev. Stat. p. 63 § 40.

In construing this statute, in *Vaughan v. Burford*, *ubi supra*, and other decisions, Surrogate Bradford went astray. The supreme court, following him, established a will signed by the witnesses before subscription by the testator, but on the same occasion. The judgment was reversed in 1868 by the unanimous voice of the court of appeals, then exceptionally strong. The reasoning of the opinion of Wood-

ruff, J., is so cogent, yet simple, that I will quote it. After showing the substantial identity of the New York statute with section 9 of 1 Vict. c. 26, and citing many of the English decisions interpreting that act, he proceeds:

“ Our statute on this precise point reads: ‘ There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.’ They are, in and by this act of signing their names, to attest, not only the signing, or acknowledgment of signing, of the testator, but his contemporaneous declaration that it is his will. Their signatures do not attest the signing by the testator if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution — they certify what is not true — when and in what moment do they begin to operate as a compliance with the statute? The only reply that can be given is, when the testator signs his name. This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week or one year, and then add his signature? Certainly not, unless he summon the same persons to see him sign or hear his acknowledgment thereof. But suppose he adds his signature and dies, what then becomes of the presumption of due execution, arising from the apparent regularity and the due form of the attestation clause? Once let it be settled that witnesses may sign before the testator and all presumption of due execution, when witnesses are dead or beyond reach, ceases. If it be said that witnesses will not sign, and so leave their names in the possession of a testator; to suppose they would, is to impeach their honesty, and it is the presumption of men’s truth and honesty which makes regularity and formal attestation *prima facie* evidence of due execution, I do not think this a sufficient answer. The statute contemplates acts, each of which is serious and important. Execution and the attestation thereof bear a plain relation to each other in point of time, in the good sense and common apprehension of everyone, and the statute prescribing the requisite formalities to a valid execution and authentication plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished. I was at first inclined to think that if the whole was done at the same interview, the attestation by the signing of the witnesses might be done in any part of it, without regard to the order of events, as above suggested, the acts of the testator may be; but, upon further reflection, I am satisfied that the view taken of the subject of the ecclesiastical court in England best conforms to the language and intent of the statute. The signing or acknowledgment by the testator and his declaration that the instrument is his last will and testament are, in the statute, made contemporaneous, and neither must necessarily precede the other, and yet, in practice, this must be construed to mean on the same occasion, each as part of the same transaction, and not requiring that the words of declaration should actually accompany the move-

ment of the pen in signing, or be actually embraced in the terms of acknowledgment of such signing. Practically which utterance is first is of no possible importance. The attestation by witnesses is of a past transaction — it is so in its nature, and so in the ordering, and, I think, the meaning of the statute. This distinction, if it served no useful purpose, if the contrary was liable to no danger, nor led to any abuse, might be deemed a too strict adherence to the literal interpretation of the law. But reasons I have suggested already, I think, show that a strict adherence to the statute is demanded. Upon the ground that, according to the testimony as it appears in the case before us, the witnesses signed before the testator, the judgment of the supreme court should be reversed."

The doctrine of this case was reaffirmed in 1876, in the case of *Sisters of Charity v. Kelly*, 67 N. Y. 409, Folger, J., saying: "It is clearly proven that the witnesses to the instrument saw no act of signing it by the deceased until after they had signed their own names to it. It is the law of this state that a subscription of a will by the testator after the witnesses have signed their names to it is not a due execution of it by him."

It is quite plain that if the true interpretation of our statute is that the witnesses are to attest, by their subscription, the testator's signature, or acknowledgment of signature, an instant of precedence on their part will render that impossible. There is no force in the argument that, in case of an uninterrupted transaction, the orderly course of procedure is not material. The case is not one of a rule that may be relaxed, but one of interpretation of language which, in the nature of things, must be rigid. Once it is determined what the words of a statute mean, they must, under all circumstances, have that meaning. It is not permissible to hold that "follow" can ever mean "precede." Besides, such a judicial modification of the statute — for that it must be — would be unsafe. Witnesses subscribing a will, on the faith that the testator will immediately sign it, can retain no dominion over the paper, and can in no way recall their act or advertise its abortion if the testator fails on his part. Protection, as well of the witnesses as of the testator, demands that there shall be a signature before attestation. Argument based on a loose practice with other than testamentary writings is valueless, for their *validity* does not depend on due attestation.

I conclude that, under our statute, it is essential to validity that everything required to be done by the testator shall precede, in point of time, the subscription of testamentary witnesses.

I shall therefore in this case vote for reversal and for the direction of decree denying probate to the paper-writing propounded as the will of Mary Ann Caldwell.

For reversal — VAN SYCKEL, DIXON, GARRISON, GUMMERE, COLLINS, GARRETSON, HENDRICKSON, VREDENBURGH, VOORHEES, VROOM — 10.

For affirmance — BOGERT, KRUEGER, ADAMS — 3.

3. "IN THE PRESENCE OF THE TESTATOR."

SHIRES v. GLASCOCK.

COMMON PLEAS. 1687.

[*Reported 2 Salk. 688.*]

UPON a feigned issue, the question was, Whether the will was made according to the Statute of Frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. ET PER CUR. The Statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn.

CASSON v. DADE.

CHANCERY. 1781.

[*Reported 1 Bro. C. C. 99.*]

HONORA JENKINS having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. The LORD CHANCELLOR [LORD THURLOW] inclined very strongly to think the will well executed, and the case of *Shires v. Glascock*, 2 Salk. 688 (1 Lord Raym. 507), 1 Eq. Abr. 403, was relied upon to that purpose. *Mr. Arden* pressed much for an issue; but, finding LORD CHANCELLOR's opinion very decisive against him, declined it.

NEWTON v. CLARKE.

PREROGATIVE COURT OF CANTERBURY. 1839.

[Reported 2 Curt. 320.]

THIS was a question as to the admission of an allegation, propounding a paper as a codicil to the will of Mr. Patrick Persse, who died in June, 1839. The question was, whether the codicil was duly executed under the Statute 1 Vict. c. 26. It was alleged, that on the 8th of April, 1839, the deceased, being then confined to his bed, directed his nephew, who was the residuary legatee in the will, to prepare a codicil, increasing the legacy of a servant from £60 to £100, which he prepared accordingly, and brought to the deceased in his bedroom, which was small, the bed standing with the foot towards the fire-place. During the execution of the codicil by the deceased, the curtains of the bed were drawn open on both sides, but closed at the foot of the bed. Two small tables were in the room, one at the foot and the other at the side of the bed. When the nephew returned with the codicil (which he had prepared in another room), into the deceased's bed-chamber, he read the same over, in the presence of White, the deceased's footman, Clarke, the servant whose legacy was increased by the codicil, and the nurse to the deceased, who in their presence and hearing, expressed his approbation thereof; the deceased then signed the codicil, in the presence of the same persons, except that one of them (White, the footman) did not actually see him sign the paper, as he was standing by the fire, where the curtains of the bed were closed. The nephew then subscribed his name, as attesting the execution, and proposed that White should do the same; previous to which, he again read the paper to White, in the presence and hearing of the testator. White then attested the codicil, signing it upon the small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign.

The Queen's Advocate and *Haggard* opposed the allegation.

Addams and *Robertson*, in support of the allegation.

SIR HERBERT JENNER. The word "present" occurs in the Statute of Frauds, and the meaning of that word has been a subject of discussion in the cases referred to. In the present case, the first consideration is, under what circumstances the execution took place. It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is, that all that was going on was heard by the deceased, the bed-curtains being open on both sides, and only closed at the foot, to screen him from the fire. All the other requisites of the Act were complied with, but it is said White could not see the testator sign his name, nor the testator see him attest his signature. To be sure it appears somewhat strange to say, that what was done by a person in the

same room, and in the hearing of another person, was not done in his presence. As far as the words of the Act go, I should be of opinion, without reference to the cases, that the witness, being in the same room, was present. The object of the Act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the Act of Parliament. The several cases referred to, were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In one of those cases (that of *Casson v. Dade*, 1 Bro. Ch. Cas. 99), the doctrine of constructive presence was carried to a great length, for the testatrix executed the will in her carriage, standing at the office of her solicitor, the witnesses retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in such a situation that she might see the witnesses sign the will through the window of the office; and this was held to be tantamount to being present: she had not ordered her carriage to be put back, and yet it was held that the attestation was constructively in her presence. In this case, no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy.

I am of opinion, that under the Act, where a paper is executed by the deceased, in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign; and if the facts pleaded in this allegation are proved to the satisfaction of the court, I must pronounce for the validity of the codicil.

*Allegation admitted.*¹

The executors afterwards took probate of the codicil.

GOODS OF COLMAN.

PREROGATIVE COURT OF CANTERBURY. 1842.

[*Reported 3 Curt. 118.*]

EDWARD COLMAN died at Naples, on the 2d of April, 1842. On the 25th of March, the deceased being ill in bed, two persons were called into his bed-room for the purpose of seeing him sign his will, and to attest its execution; the deceased then signed the will, in the presence of those two persons, but being apparently exhausted by the effort, the witnesses retired into an adjoining room, which communicated with

¹ In *Brooks v. Duffell*, 23 Ga. 441 (1857), it does not clearly appear whether the testator was able to move. Cf. *Brown v. Skirrow*, L. R. [1902] P. 3.

the bed-room by folding doors, each of the width of about eighteen inches, and which were open at the time, being tied back by strings, and the witnesses there subscribed their names to the will on a table, which was so situated, that it was impossible for the deceased to have seen them.

Addams prayed probate.

SIR HERBERT JENNER FUST. I know of no case which would authorize the court to hold that this will was attested and subscribed by the witnesses in the presence of the deceased; had the deceased been in such a situation that he might have seen the witnesses subscribe their names, it might have been held to have been done constructively in his presence, as in the case where a lady sat in her carriage, whilst the will was attested in a solicitor's office, in which she might have seen the witnesses sign their names. Here it was impossible for the deceased to see the witnesses. I reject the motion.¹

GOODS OF PIERCY.

PREROGATIVE COURT OF CANTERBURY. 1845.

[Reported 1 Rob. Ecc. 278.]

CHARLOTTE PIERCY died in February, 1845, having just before her death executed her will. She was very ill in bed, and totally blind, but in full possession of her mental faculties. The will was prepared according to her directions, and read over to her. In the presence of the attesting witnesses she signed her name in bed, one of them having placed her hand on that part of the paper where it was necessary for her to sign. By reason of there not being any table or other convenience in the bedroom on which the witnesses could sign their names, they all proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there within view of the bedroom, the doors of both rooms being open, respectively subscribed their names. A plan of the rooms was laid before the court, and in a second affidavit it was sworn, that the testatrix, from her bed, could have seen the witnesses at the table when they signed, had she had her eyesight.

Addams, on these facts, moved the court for probate.

SIR HERBERT JENNER FUST. When this case was moved on a former occasion, there was no evidence to show that the testatrix could have seen the witnesses sign, had she had her eyesight, and I felt I could not place her in a better position than one who could see. It does not appear whether there were curtains to the bed; still, as it is positively sworn by two witnesses that she could, had she had her sight, have seen from her bed the witnesses subscribe, I cannot refuse this application.

¹ See, *accord*, *Doe d. Wright v. Manifold*, 1 M. & S. 294 (1818); *Jones v. Tuck*, 3 Jones, 202 (N. C. Law 1855).

TRIBE v. TRIBE.

PREROGATIVE COURT OF CANTERBURY. 1849.

[Reported 1 Rob. Ecc. 775.]

THIS was a case of proving a will of Frances Tribe, who died December 23, 1848, the same day on which the will was executed.¹

SIR HERBERT JENNER FUST. . . . There is another question, namely, whether there has been a due compliance with the Act. The witnesses are at variance in their statements. Mary Tribe, the drawer of the will, and an interested witness, swears the curtains of the bed in which the testatrix lay were not closed, and that the attesting witnesses signed in the testatrix's sight; on the other hand, the attesting witnesses swear not only that the curtains were closed, but that it was from the circumstances they state physically impossible that the testatrix could have seen them sign. I must take the statement of the attesting witnesses to be the correct version; that not only were the curtains closed, but that had they not been closed, it was impossible, from the state in which the testatrix was, for her to have turned herself in her bed so as to have seen the witnesses sign. Under this state of circumstances what difference would there have been, on principle, if the witnesses had signed the will downstairs? The decision in *Newton v. Clarke*, 2 Curt. 320, was, I consider, right; but were I to hold the attestation in the present case good, I should go infinitely beyond that case. I cannot consider that there has here been a due compliance with the requisites of the Statute, consequently I pronounce against the will propounded. that of December, 1848; but beyond recommending the opposing party to pay the costs, I give no order respecting them.²

Addams, in opposition to the will.

Harding and *R. J. Phillimore*, contra.

NORTON v. BAZETT.

PREROGATIVE COURT OF CANTERBURY. 1856.

[Reported Deane, 259.]

THE deceased left a will in his own handwriting, executed according to the evidence of the subscribing witnesses, under the following circumstances:—

During the morning he was engaged in writing in the private or inner room of the office, in which room the deceased and his partners usually sat. The outer room was the clerks' office, where the witnesses sat; the private room was entered from the outer room by a door which

¹ The statement of facts is omitted.

² So, *Neil v. Neil*, 1 Leigh, 6 (Va. 1829); and see *Reed v. Roberts* 26 Ga. 294 (1858).

was habitually kept wide open, that is, the door was habitually rather more open than it would be if standing at right angles with the wall. The deceased was a particular man with reference to his clerks, and the door was kept thus open to enable him to look after them. It stood open in this way on the morning in question, and during the morning the witnesses passed into the deceased's room several times, and observed that he was engaged writing on his private affairs. This was apparent to them from the nature of the paper on which he was writing. Between two and three o'clock in the afternoon the deceased, being still in his room, called to the witnesses to come to him, and on entering they saw him sitting at his table with two sheets of the said paper before him, both written upon. His table was in the centre of his room, and he was sitting at it, with his back towards the partition wall between his room and theirs. As they passed through the doorway his chair was a little on their left hand. Immediately as they entered, the deceased said, "This is my last will and testament which I have made, and I request you to witness my signature." The two sheets of letter paper before mentioned lay before him at the time, and he at once signed his name "William Norton" at the end of the will on the second of the two sheets of paper, in their presence. They were both standing by his side at the time, and he remained sitting in his chair. He then handed to them the last sheet of the will, and requested them to sign their names to it, and to add the words "Witnesses to the signature of William Norton." The table in the deceased's room was full of papers, and so, for convenience in signing, they took the said last sheet to their desk in the outer office; the other sheet of the will remained on the deceased's table. They went into the outer office and there signed their names respectively to the said last sheet in each other's presence, standing whilst they did so at that corner of the desk which was nearest to the said doorway. They so signed their names as witnesses, and added the words "Witnesses to the signature of William Norton." The desk could be seen from some parts of the said private room, but not from all parts of it, and not from that part at which the deceased was sitting when they left the room to sign their names. He was then sitting with his back to the door; his chair was not two yards from the partition wall; and if he had moved a yard to his right hand from his chair, he could have seen the desk and witnesses as they signed their names; whether he did so move, the witnesses had no means of saying. As soon as they had signed their names, one of them returned alone into the inner room with the second sheet of the will, and gave it to the deceased, who then read over the signatures. When the will was brought back the deceased was standing up at that side of his table which was parallel with the said partition wall, with his back to the wall, and exactly in front of the chair on which he had been sitting when they left the room. He was apparently arranging his papers before leaving the office. How long he had left his chair they could not judge. They neither saw nor heard him between their leav-

ing and returning to his room. The door between the two rooms remained open during all the transaction. They were absent from the deceased's room about two minutes whilst so signing their names.

Sir J. D. Harding, Q. A., and Twiss, in support of the will.

Jenner and Deane, contra.

SIR JOHN DODSON. The question in the present case is, whether the witnesses subscribed their names to the paper propounded in the presence of the testator within the meaning of the word "presence" used in the 9th section of the Wills Act. The will is in the deceased's handwriting, on two sheets of paper, dated at the beginning the 13th, and at the end the 14th of July, as if he had been occupied two days in writing it out. The witnesses state that on the 14th he was busy in the inner room of his office writing on private affairs during the morning; that in the afternoon he called them into that inner room, from the outer room in which they sat, signed his name in their presence, and desired them to attest his signature, whereupon they returned to the outer office, wrote their names, and one of them brought back the paper. The door between the two rooms was open; but it appears from the evidence, and the plan which was brought in, that the place where the deceased sat in the inner room, with his back to the wall between the two rooms, was not visible to the clerks standing at the desk where they wrote their names. They could not see the deceased, nor could he see them, unless he had got up from the chair, and moved some two or three steps towards the open door. The evidence is, further, that when the clerk who brought the will came into the room, the deceased had risen from his chair, but was standing in front of that chair—had in fact merely got up to sort his papers, or for some such purpose; and there is no evidence whatever to show that he moved from the table to any part of the room from which he could see the witnesses.

In the course of the argument many, if not all, the cases which could assist the court in forming its judgment were cited. In *Newton v. Clarke*, 2 Curt. 320, the whole transaction took place in one small room, with only the curtain at the foot of the bed to interrupt the view; and Sir H. Jenner held the will to be well executed, observing that it would be somewhat strange to say that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. *Hudson v. Parker*, 1 Rob. 14, has not, I think, any very great bearing upon the present case. *Tribe v. Tribe*, however, in the same volume, page 775, seems, until closely examined, at variance with *Newton v. Clarke*; but it is clear that in *Tribe v. Tribe* it was proved that the deceased could not by possibility have seen the witnesses, and on that ground it was held that although the witnesses subscribed in the same room, still they did not so subscribe in the presence of the deceased. I should observe that most of the cases cited by counsel were also cited in *Newton v. Clarke*. In 3 Curt. 118, there is the case *In the Goods of Colman*, which very closely resembles the present; and I can find no more sure or certain guide for my

instruction than that case. The only distinction is, that there the deceased could not have moved—here he was in a situation where he could not see without moving; and upon this distinction it has been suggested that he might have moved, and then he would have seen; but there is no proof in support of the fact suggested; there is no proof whatever that he did move; and I think it is too much for the court to presume, that in the short space of time occupied by the witnesses in signing their names he did move. The conclusion to which I must come is, that where the witnesses subscribe in a different room from that in which the testator is, they must be shown to have subscribed in a position visible to the testator; that is not proved here, and I must pronounce against this will. I do so with much regret, but I have no discretion; and judging for myself, and in my own conscience, I cannot hold that there was a constructive presence such as would justify this court, whatever the Court of Appeal may do, in pronouncing for this will.

GRAHAM v. GRAHAM.

SUPREME COURT OF NORTH CAROLINA. 1849.

[Reported 10 Ired. 219.]

APPEAL from the Superior Court of Law of Rowan County, at the Fall Term 1848, his Honor *Judge Moore* presiding.

This is an issue, *devisavit vel non*, made up under the Statute to try the validity of a paper writing, propounded as the will of John Graham, deceased. The evidence was, that the supposed testator executed the will in the presence of two witnesses, and desired them to attest the instrument. He was lying in bed very sick at the time, and the two witnesses withdrew into another room, between which and the testator's sick chamber there was a door open, and at a large chest in that other room the witnesses signed their names. The bed, in which the deceased was lying, stood by the partition between the two rooms, and two or three feet from the door, and the chest, on which the witness subscribed the will, stood also against the other side of the partition, and nearly opposite to the bed; so that the testator, as he was lying in bed, could, by turning his head and looking around the side of the door, see the backs of the witnesses, as they sat at the chest writing, but he could not see their faces, arms, or hands, or the paper on which they wrote; a view of those being obstructed by the partition. After the signing by the witnesses, they returned with the will into the room where the testator was, and informed him they had witnessed it, and he requested a person present to take charge of it. The court directed the jury, that, though the testator could have seen enough of the persons of the witnesses, while they were subscribing the will, to enable him to recognize

them, yet if he could not have seen what was going on, whilst they were in the act of attestation, the paper was not properly executed and attested. The jury found against the will, and from a judgment accordingly the executor appealed.

Boydén and Craig, for the plaintiff.

Clarke, for the defendant.

RUFFIN, C. J. The rule laid down by his Honor seems to be a very rigid construction of the terms "in his presence," which are used in the Act; but it is in conformity with the cases hitherto decided on this subject, and, we believe, with the policy and meaning of the Statute. Except in the case of a blind person, "presence" seems to have been understood as having the same sense as "within view;" and it follows, that the thing to be seen, or to be within the power of the party to see, is the very fact of subscribing by the witness. Thus in *Shires v. Glascock*, 1 Atk. 688, which was the first or one of the first cases that occurred in England under the Statute of Frauds, it was held that a signing in another room, some yards distant from the testator, was a subscribing in his presence, because he might see it by a broken window; the court saying, "that the Statute required attesting in the presence of the testator, to prevent obtruding another will in the place of the true one;" therefore, that when "the signing is in the view of the testator, it is enough," though he should not actually see them signing. That, we take it, is the true principle of the Statute, that a subscribing by the witness must be in such a situation, whether within or without the testator's room, as will enable the testator, if he will look, to see, that the paper signed by him is the same, which is subscribed by the witness. Therefore, when they subscribe out of the testator's room, and in such a situation that he cannot see the paper, and for that reason cannot see and know for himself, that it is the true paper, it cannot in any proper sense be said, that the thing was done in his presence. The Statute meant, that he should have evidence of his own senses to the subscribing by the witnesses, just as he should to a signing for him by another by his direction and in his presence; so as to exclude almost the possibility of imposition by substituting one paper for another, without detection by the testator himself upon his own ocular observation, and without exposing him to any risks from undue confidence. In *Doe dem. Wright v. Mansfield*, 1 M. & S. 294, Lord Ellenborough lays down this to be the rule; that, when the deviser cannot see "the act doing," that is out of his presence. And in the case of *Casson v. Dade*, 1 Bro. C. C. 99, Lord Thurlow held a will to be well executed which was attested at the window of an attorney's office, because the testatrix was sitting in her carriage and it was put back to the window of the office, so that she "might see what passed;" so it is said in the other case of *Davy v. Smith*, Salk. 395, that the testator might have seen the witnesses "subscribe their names" if he would, and therefore that the will was well executed. We believe, indeed, that there is no instance, in which a paper has been sustained, where the attes-

tation was under such circumstances, that the testator could not see what was done, so as to protect himself upon his own knowledge against any dishonest substitution by the people, whom he is obliged by the law to select, and depend upon, as subscribing witnesses to his will.

PER CURIAM.

*Judgment affirmed.*¹

RIGGS v. RIGGS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[*Reported 135 Mass. 238.*]

APPEAL from a decree of the Probate Court disallowing the will and codicil of Jackson Riggs. The case was heard before *C. Allen, J.*, on the issues whether the witnesses to the will and codicil, or to either of them, attested and subscribed the same in the presence of the testator, within the meaning of the Statute. The will was executed on November 15, 1881, and the codicil, which confirmed the will except in one particular, was executed on December 8, 1881. The judge ordered a decree to be entered that the will and codicil be admitted to probate, and the case remitted to the Probate Court for further proceedings. The contestant appealed; and the judge reported the case for the determination of the full court, in substance as follows:—

The witnesses to the will saw the testator sign it, and were in the room with him at the time; and they signed it as witnesses in the room adjoining that in which the testator was, and at a distance of about nine feet from him, the door being open. The testator was in bed, and in such a position that, if he had been able to turn his head round, he might, by so turning it, have seen the witnesses when they signed their names, and also the will itself, unless during a part of the time, when their bodies obstructed the view; but, from the effect of an injury which he had received, he could not, in point of fact, turn his head sufficiently to see them and the will at the time when they were signing their names as witnesses.

The witnesses to the codicil did not see the testator sign it, but he acknowledged it to be his signature in their presence, and they signed the codicil as witnesses in the same room with him, and within four feet of his head, and at a table which stood near the head of his bed, and on one side, and a little farther back than directly opposite to his head. By turning his head, if he had been able to do so, he could have seen them when they signed their names, and also the codicil itself; but, in point of fact, from the effect of said injury, he was not able to

¹ See *Drury v. Connell*, 177 Ill. 43 (1898). Cf. *Nock v. Nock*, 10 Grat. 106 (Va. 1853).

turn his head sufficiently to see them or the codicil at the time when they were signing their names as witnesses.

After the witnesses had signed their names to the original will, it was handed to the testator as he was lying upon the bed, and he read their names as signed, and said he was glad it was done. At the times when the witnesses signed their names to both will and codicil, the testator was conscious, and could hear all that was said, and knew and understood all that was done.

Upon the evidence, there was no reason to suspect any fraud upon the testator in respect to the execution or attestation of the will, or any undue influence upon him; and it was conceded that he was of sufficient mental capacity.

L. Cowan, for the contestant.

I. W. Richardson, in support of the will, was not called upon.

MORRIS, C. J. The only question presented by this report is as to the sufficiency of the attestation by the witnesses to the will and codicil of the testator.

The Statutes provide that, in order to be valid, a will or codicil must be signed by the testator, or by some person in his presence and by his direction, "and attested and subscribed in his presence by three or more competent witnesses." Gen. Sts. c. 92, § 6. Pub. Sts. c. 127, § 1.

It appeared at the hearing that the testator had received a severe injury, and was lying upon his bed unable to move. His sight was unimpaired, but he could only look upward, as he was incapable of turning his head so as to see what took place at his side. As to the codicil, it appeared that it was attested and subscribed by the three witnesses in the same room with the testator, at a table by the side of the bed about four feet from his head. The contestant contends that this attestation was insufficient, because the testator did not and could not see the witnesses subscribe their names. It has been held by some courts, upon the construction of similar Statutes, that such an attestation is not sufficient. See *Aikin v. Weckerly*, 19 Mich. 482, 505. *Downie's Will*, 42 Wis. 66. *Tribe v. Tribe*, 13 Jur. 793. *Jones v. Tuck*, 3 Jones (N. C.) 202. *Graham v. Graham*, 10 Ired. 219. But we are of opinion that so nice and narrow a construction is not required by the letter, and would defeat the spirit, of our Statute.

It is true that it is stated, in many cases, that witnesses are not in the presence of a testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence.

In England, where the tendency of the courts has been to construe the Statute with great strictness, it has always been held that a blind man can make a valid will, although of course he cannot see, if he is sensible of the presence of the witnesses through the other senses. *Piercy's Goods*, 1 Rob. Ecc. 278. *Fincham v. Edwards*, 3 Curt. Ecc. 63. It would be against the spirit of our Statutes to hold that, because a man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will.

The Statute does not make the test of the validity of a will to be that the testator must see the witnesses subscribe their names; they must subscribe "in his presence;" but in cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, they subscribe in his presence; and the will, if otherwise duly executed, is valid. In a case like the one before us, there is much less liability to deception or imposition than there would be in the case of a blind man, because the testator, by holding the will before his eyes, could determine by sight that the will subscribed by the witnesses was the same will executed by him. We are of opinion, therefore, that the codicil was duly attested by the witnesses.

The facts in regard to the attestation of the original will do not materially differ from those as to the codicil. The witnesses signed the will at a table nine feet distant from the testator, which was not in the same room, but near the door in an adjoining room. The door was open, and the table was within the line of vision of the testator, if he had been able to look, and the witnesses were within his hearing. The testator could hear all that was said, and knew and understood all that was done; and, after the witnesses had signed it, and as a part of the *res gestæ*, it was handed to the testator, and he read their names as signed, and said he was glad it was done. For the reasons before stated, we are of opinion that this was an attestation in his presence, and was sufficient.

The result is, that the decree of the justice who heard the case, admitting the will and codicil to probate, must be affirmed.

*Decree affirmed.*¹

¹ See *Moore v. Moore*, 8 Grat. 307 (Va. 1851); *Cook v. Winchester*, 81 Mich. 581 (1890); *Raymond v. Wagner*, 178 Mass. 815 (1901).

NOTE. — In a few jurisdictions it is necessary that the witnesses should sign in the presence of each other. 1 Woerner, Amer. Law Adm. (2d ed.) § 40.

In a number of jurisdictions holographic wills need not be attested. Woerner, § 43.

G. *Conditional Wills.*

EATON v. BROWN.

SUPREME COURT OF THE UNITED STATES. 1904.

[Reported 193 U. S. 411.]

THE facts are stated in the opinion of the court.

Mr. J. Altheus Johnson and *Mr. Joseph A. Burkart* for the appellant.

Mr. Thomas Watts for appellee:

MR. JUSTICE HOLMES delivered the opinion of the court.

The question in this case is whether the following instrument is entitled to probate:

“ Washington, D. C. Aug. 31" /001.

“ I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please.

Caroline Holley.”

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicil of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the *factum* of the instrument. *Pohlman v. Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened.

Parsons v. Lanoe, 1 Ves. Sr. 189; *S. C.*, Ambler, 557; 1 Wils. 243; *Sinclair v. Hone*, 6 Ves. 607, 610; *Roberts v. Roberts*, 2 Sw. & Tr. 337; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the court is of the opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon v. Damon*, 8 Allen, 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a common place. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody v. Conly*, 27 Gratt. 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands. We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent — one to a church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith v. Cabell*, 19 Gratt. 758, 783. And then she goes on to say that all that she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to

which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons v. Lanoe*, Lord Hardwicke emphasizes the proposition that under the circumstances of that case no Court of Equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. *Ambler*, 561; 1 *Ves. Sr.* 192. It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return, (which I will, no preventing Providence)." *Todd's Will*, 2 *W. & S.* 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the Goods of Porter*, *L. R.* 2 *P. & D.* 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 *P. D.* 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of some of the earlier ones. *In the Goods of Mayd*, 6 *P. D.* 17; *In the Goods of Dobson*, *L. R.* 1 *P. & D.* 88; *In the Goods of Thorne*, 4 *Sw. & Tr.* 36; *Likelfield v. Likelfield*, 82 *Kentucky*, 589; *Bradford v. Bradford*, 4 *Ky. Law Rep.* 947; *Skipwith v. Cabell*, 19 *Gratt.* 758, 782-784; *French v. French*, 14 *W. Va.* 458, 502.

*Decree reversed.*¹

¹ See 1 *Williams Exec.* (10th ed.) 134-137. Cf. *Marston v. Roe d. Fox*, *post*.

SECTION III.

REVOCATION OF WILLS.

A. *By Subsequent Instrument.*

BROOK v. WARDE.

NISI PRIUS. 1572.

[Reported Dyer, 310 b.]

ONE Kyete, of Kent, by his will in writing, devised his land of gavel-kind to one Harrison in fee; and five days before his death he revoked his will in this point, by parol only, in the presence of three witnesses, requiring their testimony of his present revocation; and said to them further, that he would alter this in his written will when he came to town, &c., and before his coming thither he was murdered by the said Harrison. And Harrison caused the will in writing, as it was at first, to be proved; and by color thereof entered into the devise, and then was attainted of murder, and hanged: and his son entered by the law of gavelkind, s. "The father to the bough, the son to the plough." This matter came out in evidence to a jury of Kent this term, in *ejectione firmæ* between *Brooke and Warde*; and this manner of revocation by parol as above was affirmed for sufficient revocation at bar and bench, although it was not in writing, nor the first will in that point cancelled or defaced; *vide bene*.¹

HITCHINS v. BASSET.

KING'S BENCH. 1688. HOUSE OF LORDS. 1693.

[Reported 2 Salk. 592.]

IN ejectment, the jury found a special verdict: That Sir H. Killigrew being seised in fee, made his will, and devised his lands to B. for life, remainder to C. in fee; they find likewise that Sir H. Killigrew made *aliud testamentum* in writing; but what were the contents of that will they do not know: The question was, if the first will was revoked? *Finch* argued, that every later will is not a revocation, for a man by one will may dispose of one acre, and by another will of another acre: So if a man purchase lands after he has made his will, he need not make his will over again, but make another will as to these. *Vide* Cro. Car. 293. Therefore this other will might be of other lands, and no revocation, and the *aliud testamentum* might be no revocation, but might be consistent. Cro. Eliz. 721; Cro. Car. 24. *Levinz*, contra, argued, that revocations are favored, because they are in the nature of

¹ See *Card v. Grinman*, 5 Conn. 164 (1828).

restitution to the heir, and all restitutions are favored. *Vide* Dyer, 310; Moor. 429; 1 Roll. 614. A deed of feoffment without livery, a bargain and sale without enrolment, a grant of a reversion without attornment will revoke a will, and yet these are void acts; but the reason is, that it appears now it was not the testator's intent that it should remain his will, the first will must be supposed to be perfect and include all; and if a man claims by devise, he must in pleading say, that the testator by his last will devised, &c. 44 Ass. 36; 2 Ric. 2, 3 *b*. But the COURT were of opinion, that it was no revocation, and the *aliud testamentum* might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the House of Lords. *Vide* Hard. 374; Parl. Cases, 146.¹

WALCOTT v. OCHTERLONY.

PREROGATIVE COURT OF CANTERBURY. 1837.

[Reported 1 Curt. 580.]

SIR HERBERT JENNER.² Charlotte Anne Montgomerie Ochterlony, the deceased in this case, died at Edinburgh, on the 9th of June, 1835, of the age of twenty-three years, leaving an only brother, Sir Charles Metcalf Ochterlony, Baronet, her only next of kin. On the 30th of April, 1834, the deceased, when in London, with her own hand made her will, of which she appointed James George, John Edward Walcott, and John Ross executors. This will was deposited with Mr. George for safe custody; and the question is, Whether, under the circumstances of this case, that will is revoked? In November, 1834, the deceased went to lodge at the house of a Mrs. Bogle, in Edinburgh, where she continued until her death. In April, 1835, it appears that she was attacked with a disease of the heart, of which she ultimately died; and her medical attendants directed that she should not be suffered to write or read, or attend to business, in order that she might not be agitated.

In the beginning of May, 1835, Mrs. Bogle, by the deceased's desire, wrote to Captain Walcott's wife at Bath requesting her to get her husband to write to Mr. George, directing him to destroy the deceased's will. Captain Walcott accordingly wrote to Mr. George, but he declined to destroy the will, but sent it to Captain Walcott that he might, if he thought proper, destroy it or forward it to Miss Ochterlony. Captain Walcott, it appears, on the 10th of June, enclosed the will in a letter to the deceased, which he forwarded by a lady who was

¹ Followed by *Harwood v. Goodright*, Cowp. 87 (1774); and extended to a will of personalty, where the contents of the later lost will were unknown, save that it began, "This is the last will and testament." *Cutto v. Gilbert*, 9 Moore, P. C. 181 (1854). See also *Hellier v. Hellier*, L. R. 9 P. D. 237 (1884); *Lane v. Hill*, 68 N. H. 275 (1895).

² Only the opinion is here given.

going from Bath to Edinburgh, but the deceased died before the will arrived. It appears that up to the time of her death, the deceased expressed her anxiety that the will should be destroyed, and stated to Mrs. Bogle that she would make a new will in order to revoke the former, but that Mrs. Bogle dissuaded her from so doing, informing her that as the will would be destroyed it was unnecessary to make a new one.

It is proved by Mrs. Bogle, that the letters were written by the deceased's direction, and that the passages relating to the destruction of the will were read over to and approved of by her. Now, although looking at the contents of the will, there was no reason to suppose that the deceased would depart from it; yet improbability must give way to facts, and there is no ground to suspect that Mrs. Bogle, who was ignorant of the contents of the will, had any interest or bias in respect to it.

The first question, therefore, on the facts she deposed to is, What was the intention of the deceased? There could be no doubt of her *animus revocandi*, and having established this point, what does the law require to give effect to such intention?

The Statute of Frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed by *any words*. Is this a revocation by words? I apprehend not; the deceased did not say, "I revoke my will," but in effect says, "Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;" and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was *an absolute direction to revoke, reduced into writing in the deceased's lifetime*. There is nothing in the Statute of Frauds which prevents such revocation having effect, and it is clear that, prior to that Statute, a will might be so revoked. Further, the deceased subsequently directed a letter to be written to Mr. George, intimating that she would give her reasons thereafter, and evinced anxiety for a reply to that letter down to the time of her death; there can be no doubt that she died in the intention to revoke the will, and in the belief that it was revoked.

I am of opinion, that the will in this case is revoked, and that the deceased is dead intestate.

The Queen's Advocate and *Nicholl*, for Captain John Edward Walcott.

Lushington and *Haggard*, contra.

FREEMAN v. FREEMAN.

CHANCERY. 1854.

[Reported 5 De G. M. & G. 704.]

THIS was an appeal from a decision of *Vice-Chancellor Wood*, holding that a will expressly devising copyhold estates was not revoked, as to those estates, by a subsequent will.

The case is reported in Mr. Kay's Reports, page 479, and the material facts with reference to the appeal were the following:—

The testator Thomas Freeman was, at the time of making each of the wills, entitled, upon the death and failure of issue of his brother, to the reversion in fee of certain copyhold hereditaments, holden of the manor of Bromyard, but which he never surrendered to the use of either will. He was also entitled to certain freehold hereditaments in fee-simple in possession.

The earlier will was dated the 18th of June, 1804, and was executed and attested as the law then required in order to pass freehold estates by devise. After directing that all the testator's just debts and funeral expenses, and the expenses of proving that his will, should be paid and discharged by his executrix and executors thereinafter named, and charging his estate and effects with the payment thereof, the will proceeded as follows: "I give, devise, and bequeath unto my wife Elizabeth Freeman, for her life, in case she shall not marry again, subject as hereinafter mentioned, all the estate, right, title, and interest which I have of, in, or to all and every or any of the freehold, leasehold, and copyhold estates given and devised by the will of my late father to my brother Edward Freeman, with remainder or reversion to the right heirs of my said late father, in default or failure of issue of my said brother Edward, and also all and every other estate and estates, whatsoever and wheresoever, freehold, leasehold, or copyhold, and to which I have any right or title whatsoever, in possession, reversion, remainder, or expectancy, to hold to my said wife and her assigns for her life; subject to and I do hereby subject and charge the said premises, and every part thereof so as aforesaid given to my said wife, with the breeding up, maintaining, and educating of my two younger sons, Thomas Dew Freeman and John Freeman, and my daughter Eliza Freeman; and from and immediately after the decease or second marriage of my said wife, which shall first happen, I give, devise, and bequeath all the aforesaid messuages, tenements, lands, estates, and premises unto my said two younger sons, Thomas Dew Freeman and John Freeman, and my daughter Eliza Freeman, their heirs, executors, administrators, and assigns forever." The will also contained the following clause: "And whereas my eldest son Edward Bellingham being well provided for by the will of my father, I give him by this my will the sum of £10 only, by way of acknowledgment;" and the testator thereby appointed his wife Elizabeth Freeman, his brother Edward,

and his cousin Richard Barneby, joint executrix and executors of that his will.

The subsequent will was dated the 25th of August, 1807, and was similarly executed and attested. It was as follows:—

This is the last will and testament of me Thomas Freeman, of the Whitehouse, in the parish of Suckley, and county of Worcester, gentleman: whereas, in and by the will of my late father, Thomas Freeman, deceased, my eldest son, Edward Bellingham Freeman, will become, upon my decease, entitled to all my freehold estates, which will make an ample provision for him: Now I do hereby give and bequeath to my wife Elizabeth Freeman, for and during the term of her natural life, all and singular the stock, crop, and effects, both real and personal estates, of what nature or kind soever, and from and after her decease, I leave and bequeath all my crop, property, personal estates, and effects, of what nature or kind soever, and from and after her decease I do give and bequeath all and every my child or children (except the said Edward Bellingham), who shall or may be living at the time of my decease, to be equally divided between them, share and share alike; and I make, nominate, declare, and appoint my wife sole executrix of this my will. In witness whereof I have hereunto set my hand and seal, the 25th of August, 1807.

THOMAS FREEMAN.

The testator died in September, 1807. He left him surviving his widow and Edward Bellingham Freeman, who was his eldest son and heir-at-law, and also his heir according to the custom of the manor of Bromyard. His three younger children, Thomas Dew Freeman, John Freeman, and Eliza Freeman, and with two other children named Louisa Freeman and Mary Ann Freeman (who were both born after the date and execution of the earlier will), also survived him.

The testator's widow died in 1827, and his brother, Edward Freeman, died in October, 1851, without leaving issue.

The plaintiffs in the present suit were Thomas Dew Freeman, and persons claiming under others of the testator's younger children; and the defendants were persons claiming under the customary heir, and some of the younger children.

The bill sought to have the want of a surrender of the copyhold premises to the use of the testator's will supplied, and an injunction to restrain proceedings in ejectment, which were in the course of prosecution by the persons claiming under the customary heir.

The Vice-Chancellor decided in favor of the plaintiffs. The defendants claiming under the customary heir appealed.

Mr. W. M. James and *Mr. Metcalfe*, for the plaintiffs, and *Mr. Rolt* and *Mr. Hislop Clarke* for defendants in the same interest.

Mr. Chandless and *Mr. Berkeley*, for the appellants.

THE LORD JUSTICE KNIGHT BRUCE. It is conceded in this case on

the part of each of the plaintiffs and defendants, that the copyhold estate in dispute is the only copyhold property that the testator Thomas Freeman, the son, had or was interested in; that he never surrendered any copyhold property to the use of his will; that his customary heir was sufficiently provided for independently of copyhold property; that the testator, when he executed the second of the two testamentary instruments in question, had a freehold estate held by him in fee-simple devisable and devised by it; that accordingly, if it had been his only testamentary instrument, not one of the respondents would have any title or claim to the copyhold property in dispute, or any interest in any part of it; and that, on the other hand, if the earlier had been his only testamentary instrument, the equitable title to the copyhold property would clearly not be as the appellants contend. The controversy to be determined, therefore, is, whether the testator died intestate as to this property; for, if he did not, the equitable title to it became, upon his death, governed by the earlier of the two testamentary instruments. But the testator did not die intestate as to his copyhold property, unless the earlier was revoked by the later of the two instruments, at least as to that property. The later instrument, however, does not profess or purport to revoke, nor does it notice any other testamentary disposition of the testator or give or affect any part of his copyhold property. It may be true that the second testamentary instrument disposes of some, or the whole, of his other disposable property, in a manner differing materially from the intention of the earlier instrument, but (I repeat) the later instrument does not devise or affect — does not profess to devise or to affect — the copyhold estate or any part of it. Both instruments, then, as it seems to me, may well stand in force as containing together all the testator's testamentary dispositions, those contained in the later paper superseding of course, so far, but only so far, as they contradict or depart from, those contained in the earlier document; for the mere circumstance that, in the later instrument, he calls it his last will and testament, and uses the expression "this my will," amounts, in my opinion, to nothing, so far at least as real estate is concerned. That is to say, I consider that, for every present purpose at least, it cannot be read or construed otherwise than it would have been right to read and construe it, if instead of using the words "the last will and testament" he had said "a testamentary instrument," and instead of saying "sole executrix of this my will" he had said "my sole executrix."

If he had begun it with the words, "This is my only will," it might have been open to different considerations. But, I repeat, whatever may be the view of the Ecclesiastical Courts, I do not think a temporal court bound to say that when a man in an instrument, containing testamentary dispositions by him, describes it as his last will and testament and otherwise calls it his will, he is to be taken *prima facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the later does not extend.

It appears to me that the appellants have no ground for complaining of the decree, and that their petition of appeal ought to be dismissed with costs.

THE LORD JUSTICE TURNER. The question is whether the subsequent will operates as a revocation of the prior one, the former unquestionably pointing to copyholds, the latter not in any manner pointing to that description of property. No case has been cited where a distinct property having been given by a first will, the disposition of it has been revoked by another will making no reference to that property. I am not inclined to extend the principle of the decisions for the purpose of creating an intestacy, which would, in this case, be the consequence of the extension.

It is not necessary to say what indication of intention to dispose of property by a subsequent will may be sufficient to effect a revocation of an earlier testamentary disposition, although no effectual disposition of the property may be contained in the later document. That is not here the question. The testator, in this case, must be taken to have known when he made the second will that he had disposed of the property in question by the first. It is said, however, that the law of the Ecclesiastical Courts is different, but the principle on which those courts act may be explained by the circumstance that they regard the appointment of the executor as disposing of the whole of the personal estate. That principle has never been applied to real estate in this country, and by deciding in favor of the appellants we should be extending it to a case to which, in my judgment, it ought not to be extended. Those who represent the heir ought not, I think, to have brought the action of ejectment, and had the case come originally before me, I should have thought that they ought to have suffered the consequences of having done so; but the Vice-Chancellor has dealt more mercifully with them, and I will not depart from his decision. They must, however, pay the costs of this appeal.

PLENTY v. WEST.

PREROGATIVE COURT OF CANTERBURY. 1845.

[Reported 9 Jur. 458.]

SIR HERBERT JENNER FUST.¹ The question is, whether there is any rule of law binding upon the court to give effect to these papers, and so to prevent a partial intestacy. The circumstances of the case are these : The deceased left three testamentary papers, a will dated October 5, 1837, a will and codicil dated April 13, 1838. Probate has already been granted of the two papers dated in April, 1838, and the court is now asked to revoke that probate, and to decree probate of all three papers, as together containing the last will and testament of the deceased. The first observation, which the case suggests, is this, the

¹ The opinion only is printed.

deceased had practised as a solicitor, and had been clerk of the peace for the county of Berks, he must, therefore, be presumed to have known what would be a good and valid disposition of his property. The will of 1837 is very short, and contains a disposition of the whole of his property. The will of 1838 commences in these words: "This is the last will and testament of me, William Budd," so that it clearly purports to be his last will, and it is all in his own handwriting. However, it is true, that it contains only a partial, a very partial, disposition of his property, and if it stands alone, the deceased will be dead intestate with respect to the greater portion of his estate. Then, the third paper is this, "Of this my will, I appoint C. S. and W. W. executor and executrix. As witness my hand, the day and year above written." This is duly executed and written on the same sheet of paper as the will of 1838. So that this will of 1838 is twice declared by the testator to be his will, or last will, and I am asked to say, that it is not so, but that the will of 1837 is also a part of his last testament. I have heard no case cited from this court, which would enable me to pronounce such a sentence. Nor do I see how I am to declare that to be a part of a will, to which I find that the testator, in instruments of a later date, makes no reference whatever, and to which, as appears by the evidence, he made no allusion when he executed the subsequent papers. I have been referred to a rule which is said to exist with respect to real property, but I know of no such rule applying to personalty. I must collect the intention of the testator, as I best can, from all the circumstances of the case, and I can find nothing to show that he intended all three papers to be taken together. It is certainly desirable to avoid a partial intestacy; but the appointment of executors in the second paper, of 1838, is sufficient to make a complete will, for all the property of the deceased must pass through their hands. Looking, then, to the intention of the testator, and the absence of any case in these courts in support of the doctrine contended for, I am of opinion, that the will of 1837 was, in fact, though not formally, revoked, and I direct the probates of the will and codicil of 1838 to be delivered out.¹

Dr. R. Phillimore, for Caroline Plenty.

Dr. Addams, for West and Budd.

¹ In the report of this case in 1 Rob. Ecc. 264, the testamentary writings are given at length. By the first will the testator gave all his estate, real and personal, to three persons in trust to divide the same between three boys on their reaching twenty-one. The second will gave all the testator's "household goods at Newbury" to C., gave successive life estates in all his real estate "as well freehold, copyhold, or leasehold," to several persons, "and then as to all my copyhold estate of Burghclere" to B. in fee.

LEMAGE v. GOODBAN.

COURT OF PROBATE. 1865.

[Reported L. R. 1 P. & D. 57.]

THIS was a cause of revoking a probate, which had been granted on motion, of the will of the testator, John Lamage, who died on the 25th of January, 1864, at an advanced age, a bachelor, without parent, leaving Rachael Lamage, his sister by the whole blood, and Marmaduke Lamage, the plaintiff, his brother by the half blood, his sole next of kin, and the only persons entitled in distribution to his personal estate, him surviving. He left freehold and leasehold property and personal effects of considerable value. There were discovered after his death only two finished testamentary papers, both in holograph, the earliest unattested, and dated the 24th of December, 1823, and the later one purporting to have been attested by three witnesses, and which, from the watermark and from internal evidence, as well as that of one of the attesting witnesses, must have been executed between the years 1827 and 1829.

The earliest will described in the proceedings as paper A was in the following terms: "In the name of God, Amen. I, John Lamage, of No. 31, Gloucester Street, in the parish of St. George's, &c., do make this my last will and testament in manner following: First, and principally, I commend my soul to God, &c., and as to such worldly estate as God of his goodness hath bestowed on me, I give and dispose thereof as follows — that is to say, I give and devise unto and to the sole use of my dear sister, Rachael Lamage, spinster, at present residing at, &c., to her, her heirs and assigns, all and everything which I may possess in the world at the time of my decease, namely, my freehold house, situated and being No. 10, Great Earl Street, Seven Dials; also my leasehold estate, situate and being No. 54, St. John Street Road, &c.; likewise all the money that I may possess, whether in cash or bonds as security for money, such as India Bonds, Danish Bonds, Spanish Bonds, together with seven hundred and fifty-one rentes in the French Funds, and being inscribed in the great book as above, with all interests on rentes which may be due on the aforesaid. I likewise bequeath to dear sister before-named all my household furniture, plate, linen, china, watch, chain, seals, or trinkets of any kind belonging to me, also all my books, prints, paintings, mathematical and philosophical instruments, wearing apparel, &c., &c., &c.; and do hereby appoint and make my dear sister, the aforesaid Rachael Lamage, my whole and sole executrix, requesting her to pay the expense of my funeral out of the effects, together with a bond held by my father from me for £400 sterling, should he demand the same, the said bond being the only one which I owe, nor any debts, except for rent, which will only be from the preceding quarter day. If from my ignorance of the law I should have omitted anything, I here repeat that it is my wish and most solemn will that my dear sister, Rachael Lamage, shall come into

possession of everything which I may possess at my decease. This 24th day of December, 1823 — JOHN LEMAGE."

The later will, described as paper B. was as follows: "In the name of God, Amen. I, John Lepage, of No. 31, Gloucester Street, Queen's Square, &c., *do make this my last will and testament in manner and form following*: I give, devise, and bequeath unto my dear sister, Rachael Lepage, spinster, the whole of my moneys and securities for moneys whatsoever and wheresoever, as the whole of money inscribed in my name in the great book in the Bank of France, about seven hundred and fifty-one rentes, or whatever it may be; also all bonds of whatever description. I further give unto my sister aforesaid my leasehold house in St. John Street Road. I also give and devise and bequeath unto my sister my half-share of the freehold house left me by my father in Earl Street, Seven Dials. I also give unto my sister aforesaid the annuity or rent-charge secured to me by Maria Lepage, widow of my father, on my said father's estate. I likewise give unto my sister aforesaid all my plate, linen, and china, philosophical instruments, *and effects of every kind and description, together* with the whole of the above specified for her use, or her heirs, executors, administrators, or assigns forever, according to the description thereof, that is, the said property. I do further devise and bequeath unto my sister aforesaid, or to her heirs, executors, administrators, or assigns, my share or portion of the money that shall be produced from the sale of the estate of my father, which he directed by his will to be divided among his six children, as described, or to their heirs, executors, administrators, and assigns. *I further distinctly state that if I have omitted any legal point or form, that is my intention that my sister Rachael Lepage shall die possessed of, for her own use and disposal, how to whom she pleases.* And I do hereby nominate and appoint my sister whole and sole executrix to this my last will and testament. (S. D.) J. LEMAGE. Signed, sealed, declared, and published by the above-named John Lepage, as and for his last will and testament, in the presence of us, who at his request and in his presence have subscribed our names as witnesses. (S. D.) GEORGE CHARLTON; (S. D.) JOSEPH WELLSHER; (S. D.) HENRY EASTON."

On the 26th day of April, 1864, Rachael Lepage, without notice to the plaintiff, who was then unaware of his half-brother's death, obtained a decree on motion, for probate of the two papers A and B, as together containing the last will of the testator, to be granted to her, and afterwards took probate thereof as sole executrix. Rachael Lepage shortly afterwards died. The plaintiff subsequently, upon ascertaining what had been done, extracted a citation from the registry calling upon the executors of Rachael Lepage to bring in the probate and show cause why it should not be revoked, and probate granted of the last will only.

The defendants, the executors of Rachael Lepage, appeared to the citation, and delivered a declaration wherein they alleged, "that the

testator wrote and signed the paper writing bearing date the 23d day of December, 1823, and now in the registry of the court, and marked A, beginning thus, &c., and ending thus, &c., that at some time subsequent thereto, and prior to the year 1830, he duly signed the paper writing marked B now remaining in the registry of this court, beginning thus, &c., and ending thus, &c., and subscribed the same in the presence of three witnesses, and alleged his capacity at the time of the execution of the two paper writings, and that the said paper writings A and B together contain the last will and testament of the said testator; and that on the 7th day of January, 1864, probate of the last will and testament, as contained in the said paper writings A and B, was granted to the said Rachael Lamage by the principal registry after the court had been moved to make the said grant. That the said Rachael Lamage died on, &c., leaving a will, whereby she appointed the defendants executors, who had duly proved the same. The plaintiff by his pleas,

1. Denied that the said paper writings marked A and B together contained the last will and testament of the testator, as in the declaration alleged.

2. That the said paper writing marked A was revoked by the said paper writing marked B; upon which pleas issue was joined.

The Queen's Advocate (Sir R. J. Phillimore) and *Dr. Spinks*, for the defendants.

Dr. Tristram and *W. Forster*, for the plaintiff.

Cur. adv. vult.

SIR J. P. WILDE. After carefully considering the authorities cited in argument, I retain the opinion expressed on the *ex parte* application for probate. The case of *Plenty v. West*, 1 Rob. Ecc. 204, so far as it supports the doctrine, that the use of the words "last will" in a testamentary paper, necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert*, 9 Moore, P. C., and *Stoddart v. Grant*, 1 Macq., and the case of *Henfrey v. Henfrey*, 4 Moore, P. C. 29,¹ only decides that, a second will disposing of the whole estate, revokes a former disposition. Cases of the present character are properly questions of construction, and in deciding upon the effect of a subsequent will on former dispositions, this court has to exercise the functions of a court of construction. The principle applicable is well expressed in Mr. Justice Williams' book on *Executors*. He says, "The mere fact of making a subsequent testamentary paper, does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate,

¹ In this case both wills disposed of the whole of the testator's property. The first will appointed executors; the second did not. — Ed.

as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the former, *as to those parts only*, where they are inconsistent." This passage truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the Statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers, will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the "intention" to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate,—is the true question. And so this court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain. In this case such a task is not difficult. The first paper makes the testator's sister the sole object of bounty and residuary legatee. The second is to the like general effect; no new object of bounty is introduced, and the sole reason for its execution seems to have been, that the testator's father had died in the interval, and that half a freehold house, and a share of personalty, had devolved on him by that event. These new acquisitions he devises and bequeaths in the same direction. But the residue is not disposed of, the clause apparently intended for that purpose being defective in its language, and not reading sensibly. The court, can, however, see thus far into the intent of that clause—that the object of it was the same sister whose name alone appears in both papers. It would not be reasonable, under such circumstances, to conclude that the testator intended to revoke the residuary bequest in the first paper, and as effect can only be given to that disposition by granting probate of the first and second papers as together constituting the will—The Court so decides. I pronounce for the two papers.

Dr. Tristram asked for the plaintiff's costs, to be paid out of the estate.

Dr. Spinks, contra.

SIR J. P. WILDE. Acting upon the rule I have laid down for my own guidance, I think that the plaintiff's costs should be paid out of the estate. The litigation was justified by the state in which the testator left his testamentary papers.¹

¹ "It becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty v. West*, 1 Rob. Ecc. 264. There the court held upon all the facts before it, that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. The authority of that case has been stated by Sir E. V. Williams to be doubtful since the decision of the Privy Council in *Cutto v. Gilbert*, and Lord Penzance is said to have regarded it as overruled. The case of *Cutto v. Gilbert*, however, merely decides that the bare fact of a testator having executed an instrument as his last will and testament, the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious, for the missing instrument may have been confirmatory of the first (see *Wms. Executors*, p. 156, note c). It certainly does not appear from the judgment in that case, that there was any intention to overrule the decision in *Plenty v. West*. Dr. Lushington says (9 Moore, P. C. at p. 146): 'Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for the uniting the papers was, that the whole of the personal estate was not disposed of by the second will. It is true that Sir H. J. Fust, in his judgment, relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision.' The Judicial Committee thus appear to have approved of the decision in *Plenty v. West* upon the ground that the fact that the whole of the personal estate was not disposed of by the second will, was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects essentially different. And Lord Penzance, in *Lemage v. Goodban*, does not say that *Plenty v. West* is overruled; but with his accustomed accuracy, only says, 'the case of *Plenty v. West*, so far as it supports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto v. Gilbert*.' Lord Penzance further says: 'The intention of the testator in the matter is the sole guide and control. But the intention to be sought and discovered relates to the dispositions of the testator's property and not to the form of his will. What dispositions did he intend? not which or what number of papers did he desire or expect to be admitted to probate? is the true question.' I followed that decision in *the Goods of Petchell*, L. R. 3 P. & M. 153. In that case I considered that the intention of the testatrix in the second will was to benefit her daughter by postponing the payment of the specific legacies until after the daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I therefore came to the conclusion that the original residuary bequest in her favor was not revoked.

"Even if the second instrument contains a general revocatory clause, that is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny v. Barton*,

B. *By Destruction or Cancellation.*

BIBB v. THOMAS.

KING'S BENCH. 1775.

[Reported 2 W. Bl. 1043.]

EJECTMENT. On trial before *Hotham*, Baron, the question was, Whether a will made by one William Palin was duly revoked? It appeared in evidence that Palin (who had for two months together frequently declared himself discontented with his will), being one day in bed near the fire, ordered Mary Wilson, who attended him, to fetch his will, which she did, and delivered it to him; it being then whole, only somewhat creased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off; then rumbled it together, and threw it on the fire; but it fell off. However, it must soon have been burned, had not Mary Wilson taken it up, and put it in her pocket. Palin did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times afterwards said, "That was not and should not be his will," and bid her destroy it. She said at first, "So I will, when you have made another;" but afterwards, upon his repeated inquiries, she told him she had destroyed it (though in fact it was never destroyed), and she believed he imagined it was so. She asked him, when the will was burned, whom his estate would go to? He answered, to his sister and her children. He afterwards told one J. E. that he had destroyed his will, and should make no other till he had seen his brother, John Mills, and desired J. E. would tell him so, and that he wanted to see him. He afterwards wrote to Mills in these terms: "DEAR BROTHER,— I have destroyed my will which I made, for upon serious consideration I was not easy in my mind about that will." Afterwards desires him "to come down, for if I die intestate it will cause uneasiness." He however died, without making any other will. The jury, with whom the judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the plaintiff, the lessee of the heir-at-law.

2 Phillim. 575. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in *Henfrey v. Henfrey*, 4 Moo. P. C. 29, says, 'the question is total revocation or partial revocation.' And on this question Sir J. Nicoll says, in *Methuen v. Methuen*, 2 Phillim. 426, 'In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this court.' In the present case I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858." — *Per* SIR J. HANNEN, in *Dempsey v. Lawson*, L. R. 2 P. D. 98, 105–107 (1877).

See *Cadell v. Willocks*, L. R. [1893] P. 21; *Fry v. Fry*, 125 Iowa, 424 (1904).

Grose moved for a new trial, because this was not a sufficient revocation within the Statute of Frauds.

Davy and *Adair* showed cause.

And PER TOTAM CURIAM (DE GREY, C. J., GOULD, BLACKSTONE, and NARES, JJ.). This is a sufficient revocation. A revocation under the Statute may be effected, either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself, viz., burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent. But these must be done *animo revocandi*. *Onions and Tyrer*, 1 P. Wms. 343; *Hyde and Hyde*, 1 Equ. Cas. Abr. 409. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The Statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself, be totally destroyed or consumed, burned, or torn to pieces. The present case falls within two of the specific acts described by the Statute. It is both a burning and a tearing. Throwing it on the fire, with an intent to burn, though it is only very slightly singed, and falls off, is sufficient within the Statute.

Rule discharged.

LARKINS v. LARKINS.

COMMON PLEAS. 1802.

[Reported 3 B. & P. 16.]

THE following case was sent by the Master of the Rolls for the opinion of this court:—

William Larkins, by his will dated in 1794, gave all his land at Calcutta “unto my brother John Pascall Larkins, and to my good friend Samuel Enderby, of Aldermanbury, in the city of London, Esquire, and George Smith, of Lincoln’s Inn, in the county of Middlesex, Esquire, their heirs and assigns, upon trust,” to sell the same, the proceeds to be taken “as part of the residue of my estate and effects, and go therewith as hereafter directed;” and he gave the residue of his estate and effects, real and personal, to the said Larkins, Enderby, and Smith, their heirs, executors, administrators, and assigns, upon certain trusts.

The testator had no other real estate than that at Calcutta.

After the testator had executed the will, he struck out, by drawing a pen through them, these words in the devise of the Calcutta land, viz.: “George Smith, of Lincoln’s Inn, in the county of Middlesex.” The name of George Smith was struck out from the residuary devise also. The testator never republished the will after making these alterations.

The question for the opinion of the court was, Whether the devise

of the estate at Calcutta to the trustees named in the will was revoked by the testator's having struck out Smith's name?¹

Best, Serjt., for the plaintiffs.

Shepherd, Serjt., *contra*.

LORD ALVANLEY, C. J. I have no doubt upon this case. A revocation by obliteration will have the same effect which a revocation by any other means will have, and no more. I lay out of the case the consideration of the devisees being trustees, for in a court of law they must be considered as joint tenants in fee absolutely. Now it is argued, that the revocation of the devise as to one devisee makes an alteration in the interest of the others. But whatever this alteration be, it is not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If therefore the devisees had been tenants in common, upon the erasure of one name the remaining two would take no more than two thirds of the estate.

ROOKE, J. It is rather extraordinary that this point should now come to be decided for the first time; but though the point be new, I entertain no doubt that the erasure of the name of George Smith is to be considered as a revocation of the devise *pro tanto* only.

CHAMBRE, J. It would be most unreasonable to defeat the intention of a testator so plainly expressed as it is in the present case; and before we could come to such a decision I should expect authorities to be cited previous to the Statute of Frauds. For the revocations enumerated in the Statute were revocations at common law, and stand upon the same footing as if that Statute had never passed, it being declared that the restrictions introduced by that Statute should not extend to those revocations. The only argument of any weight which has been used is, that the remaining devisees take a larger interest. But that argument does not apply here; for the devisees, being joint tenants, are seised *per my et per tout*; and if one joint tenant die in the life of the testator, the other joint tenant takes the whole of the estate, though it never vested in him during the life of the testator; the reason of which is, that the original devise is sufficient to pass the whole interest. The case of a tenant in common is indeed different, he being only seised of an undivided moiety. The effect of this act of obliteration, as it appears to me, is to take away that from G. Smith which the testator at first intended to give him. I cannot entertain a doubt upon the subject; and indeed the authorities cited are all one way.

¹ The statement is abbreviated from the report.

DOE d. PERKES v. PERKES.

KING'S BENCH. 1820.

[Reported 3 B. & Ald. 489.]

EJECTMENT for messuages and lands in the parish of Walsall. Plea, Not guilty. At the trial before *Holroyd*, J., at the last assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir-at-law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August. 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall, "Joe, you shall see if I have done anything for the rascal or not. I have made him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee then, who was present, put his hands together, as if in an attitude of prayer, and said, "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this, the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "there is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will; and now

W. E. Taunton moved for a new trial, and contended that the cancellation was complete by the tearing of the will with the intent to destroy it, and he cited *Pemberton v. Pemberton*, 13 Ves. Jr. 290; *Bibb v. Thomas*, 2 Black. 1043; *Hyde v. Hyde*, 1 Eq. Cases Abr. 408; and *Onions v. Tyrer*, 1 Peere Williams, 343.

ABBOTT, C. J. Upon the evidence, it appears, in the present case, that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no farther, and after having fitted the pieces together, and found that no material word had been obliterated, he said, "It is well it is no worse." Now, if the

cancellation had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

BAYLEY, J. I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

HOLROYD, J. I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set up the will again. The Statute of Frauds says, "that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the same by the testator," &c., but, in order to effect this, the act of tearing, &c. must be complete. I left it to the jury to say, whether that was so, and they were of opinion, that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

BEST, J. I am of opinion, that the verdict is right. Tearing is one of the modes by which a will may be cancelled; but it cannot be contended that every tearing is a cancellation: for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no farther, and that the cancellation was complete; but here there is evidence, that he intended to go farther, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in Blackstone is very distinguishable; for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

Rule refused.

DOE d. REED v. HARRIS.

KING'S BENCH. 1837.

[Reported 6 A. & E. 209.]

EJECTMENT for messuages and other premises. On the trial before *Patteson, J.*, at the Glamorganshire Summer Assizes, 1835, it appeared that the lessor of the plaintiff claimed as son and heir-at-law, the defendant as devisee, of John Reed. The will was duly executed in August, 1832. The testator died December 31st, 1834. He was an old and infirm man: the defendant was his niece, and lived with him as his housekeeper. She exercised great influence over him; but it appeared that they had violent quarrels, and that he sometimes spoke of her to other persons in very abusive terms, and said that he feared danger to his life from her. A witness named Esther Treharne, who had been the testator's servant, stated that, about a month before he died, she was shaking up the cushion of his easy-chair, and observed, under the cushion, a folded paper. It was brown or cartridge paper, and the corner of it was burned. Shortly after, on the same day, Alice Harris went out; and, while she was away, the testator inquired for the paper: the witness told him where she had seen it, upon which he exclaimed that Alice had gone away with the will; and, on his then removing the cushion, the will appeared no longer. He then told the witness that he had sent Alice Harris to fetch the will to him, that he had looked into it, and that, when he had seen it, he had thrown it on the fire; and that Alice had "scramped" it off the fire. This appeared to have taken place the evening before. After the above conversation, Alice Harris returned; and, when she and the testator retired at night (both sleeping in the same room), the witness heard a quarrel, and blows; and, upon her going into the room, the testator said that Alice Harris would not give him his will. Alice went downstairs with the witness, and the latter urged her to give up the will; but she said she would not; that she had given it him last night, and he threw it on the fire; and that she would rather have the pleasure of burning it herself, and would do so the next morning. After this conversation she returned to the testator, on the witness's persuasion, begged his pardon, and promised to burn the will the following morning. The next morning, the witness, going into the kitchen where Alice and the testator were, heard Alice say, "There, everything is finished;" and the testator then told the witness that Alice had thrown the will upon the fire. The witness doubting it, he said, "She threw something with writing upon it on the fire; but I did not have it in my hand to look at it." The witness answered, "I do not think she has thrown it;" and the testator said, "I do not care; I will go to Lantwit, if I am alive and well, and make another will;" adding that Alice Harris should not have his property, and that he had a son nearer to him than her. He also said (as he did on many other occasions) that the will was one made by Alice and Mr. R. (the attorney who prepared it), and that R. was a thief, and

wanted, with Alice, to get everything he had. Alice Harris, in an affidavit exhibited in the Prerogative Court, stated that, on January 1st, 1835, she found the will in a trunk used by the testator for holding his deeds and papers, and kept in his dressing-room. The will produced on the trial had no mark of fire. It did not appear that any envelope had been found upon it. The plaintiff's counsel contended, first, that the testator had been prevailed upon to execute the will by importunities of such a nature as to deprive him of his free agency; and, secondly, that, assuming the will to have been properly executed, the evidence showed a cancellation within the Statute of Frauds, 29 Car. 2, c. 3 § 6. The learned judge stated to the jury, on the latter point, that, if they believed the evidence of Esther Treharne, and were satisfied that the testator threw the will on the fire intending to burn it, that Alice Harris took it off against his will, that he afterwards insisted on its being thrown on the fire again, with intent that it should be burned, and that she then promised to burn it, there was a sufficient cancellation within the Statute. The jury found for the plaintiff, not stating the grounds of their verdict. In the ensuing term a rule *nisi* was obtained for a new trial, on account of misdirection on the two points above stated. It was also objected that the evidence of cancellation was not of a proper kind; the fact being proved only by declarations, and not by the testimony of eye-witnesses, or by marks of cancellation on the will itself; and *Willis v. Newham*, 3 Y. & J. 518, was referred to as an analogous case.

Chilton and *James* now showed cause.

John Evans and *E. V. Williams*, *contra*, were stopped by the court.

LORD DENMAN, C. J. The Statute of Frauds requires that a will shall be executed with certain solemnities; and, after prescribing these, directs how it shall be revoked; and that is by certain acts, which are specified. In the present case, there is no evidence that any one of those acts has been done. It is impossible to say that singeing a cover is burning a will within the meaning of the Statute. The terms used in the sixth section show that to assert this would be going a length not contemplated in the Statute. The acts required are palpable and visible ones. Cases may, indeed, be put where very little has been done, as a slight tearing and burning, and yet a revocation has taken place; but the main current of the Statute is against the argument from such cases. The intention seems to have been to prevent inferences being drawn from such slight circumstances. In *Bibb dem. Mole v. Thomas*, 2 W. Bl. 1043, the will was slightly torn and slightly burned: and the court said that the case fell within two of the specific acts described by the Statute; there was both a burning and a tearing. Doubt might be entertained now whether the proof there given would be sufficient as to these; but, as the court considered what was done to have been a burning and a tearing, the case shows at least that they did not think the acts required by the Statute could be dispensed with by reason of the conduct of a third

party. In *Doe dem. Perkes v. Perkes*, 3 B. & Ald. 489, the testator's hand was arrested while he was in the act of tearing the will: he submitted to the interference; and the intention of revoking was itself revoked before the act was complete. There it was properly left to the jury to say whether the testator had done all he intended or not. Neither of these cases at all approaches the present. It would be a violence to language, if we said here that there was any evidence to go to the jury of the will having been burned. Great inconvenience would be introduced by holding that there may be a virtual compliance with the Statute; but there is none in saying that, if a testator perseveres in the intention of revoking his will, he shall fulfil it by some of the means pointed out in the Statute; that he shall revoke the will, if not in his possession, by writing properly attested; or cancel it, if in his power, by some of the other acts which the Statute prescribes.

PATTESON, J. I am quite satisfied that I left this case wrongly to the jury. I did not see the distinction between the present case and *Bibb dem. Mole v. Thomas* as I ought. There something had been done which the court considered to be a burning and a tearing of the will. The testator is described, not as having merely done something to the corner of the will, but as having given it "something of a rip with his hands," and so torn it "as almost to tear a bit off." It is plain that, on the production of the instrument, it would appear (though I do not think that important) that there had been some tearing of the will itself. As the Act says that there must be a tearing or burning of the instrument itself, a mere singeing of the corner of an envelope is not sufficient. To hold that it was so would be saying that a strong intention to burn was a burning. There must be, at all events, a partial burning of the instrument itself: I do not say that a quantity of words must be burned; but there must be a burning of the paper on which the will is. I am quite satisfied that I was wrong in my direction to the jury.

WILLIAMS, J. We must give effect to a Statute as providing for cases of ordinary occurrence, and not for any that may be put. It is argued that, if a testator throws his will on the fire with the intention of destroying it, and some one, without his knowledge, takes it away, that is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where would such constructions end? The effect of them would be to defeat the object of the Statute, which was to prevent the proof of a cancellation from depending on parol evidence. The will must be torn or burned; and the question will always be whether that was done with intention to cancel: how much should be burned, or whether the will should be torn into more or fewer pieces, it is not necessary to lay down.

COLERIDGE, J. The kind of construction which has been insisted upon would lead to a repeal of the Statute on this subject, step by step. The Statute, for wise purposes, does not leave the fact of can-

cellation to depend on mere intent, but requires definite acts. In the making of a will, if the proper signatures were not affixed, no explanation of the want of signatures could be received; and so, when a will has been made, to revoke it, there must be some act coupled with the intention of revoking, to bring the case within the sixth section. The question is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say: but there must be such an injury with intent to revoke as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was. Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party. But, to instance another case under the same clause of the Statute, suppose the testator had written his revocation, and that, by the act of some other party, he had been prevented from signing, or the witnesses had been prevented from attesting it; could it be said that the testator had done all that lay in him, and therefore the act of revocation was complete? We must proceed on such a view of the Statute as accords with common-sense.

*Rule absolute.*¹

DOE d. REED v. HARRIS.

QUEEN'S BENCH. 1838.

[Reported 8 A. & E. 1.]

ON the trial of this ejectment, before *Coleridge, J.*, at the Glamorganshire Spring Assizes, 1836, it appeared that the action was brought by the heir-at-law against the same devisee who was defendant in *Doe dem. Reed v. Harris*, reported 6 A. & E. 209; and the question, as in that case, was, whether the will had been revoked by the testator's throwing it on the fire, where the envelope had been partially burned. The evidence was, in all material points, the same as in the former case; but the lands for which that ejectment was brought were freehold; in the present case the lands were copyhold. The learned judge left it to the jury to say whether that which the testator did was an actual revocation of the will, and so intended by him; reserving leave, however, to move to enter a nonsuit or a verdict for the defendant, if the verdict should be for the plaintiff and this court should be of opinion that the judge ought to have directed a contrary verdict or a nonsuit. The jury said that they thought the will revoked by the burning; and a verdict was taken for the plaintiff. In the ensuing term *John Evans* obtained a rule to show cause why a verdict should not be entered for the defendant. In Michaelmas Term, 1837,

Chilton and *W. M. James*, showed cause.

Maule, John Evans, and *E. V. Williams*, contra.

Cur. adv. vult.

¹ See *Blanchard v. Blanchard*, 32 Vt. 62 (1859).

LORD DENMAN, C. J., in Hilary Term, 1838 (January 20th), delivered the judgment of the court.

This was an action of ejectment for copyhold premises by the heir-at-law of the person last seised against one who claimed as his devisee. The plaintiff succeeded at the trial; but leave was given to the defendant to move for a nonsuit, or for a verdict in his favor. On discussing a rule granted in conformity to this permission, the question was, whether the will (admitted to have been duly executed) had been well revoked. The facts lay in a narrow compass. The testator was much under the influence of the devisee, who lived with him as his housekeeper, but, according to the testimony of a witness to whom the jury gave credit, he had frequent quarrels with her, often complained of her behavior towards him, and on one occasion, when irritated, he threw the will upon the fire: she rescued it without his knowledge, at which he expressed his displeasure when informed of it. The paper in which it was wrapped was thereby partially burned; but the will itself was not affected by the fire. The devisee kept it till after the testator's death.

These circumstances being established in evidence, the learned judge asked the jury whether what was then done by the testator was an actual revocation of the will and so intended by him. In another case tried between the same parties the same question had arisen; and upon the same facts the court was of opinion that the will was not revoked. That ejectment was, however, brought to recover freehold lands; and our decision proceeded wholly on the express enactment of the Statute of Frauds. (His Lordship here read § 6 of Stat 29 Car. 2, c. 3.)

There the will itself was not burned: we therefore thought that the Statute prevented it from being revoked, and that no evidence whatever of what was said, proving an intention to revoke, could supply that deficiency. But, the property now in question being copyhold, to which the Statute of Frauds does not apply, because it is not devisable within the Statute of Wills, the point is different, and must be treated as if the first-mentioned Act had never passed. In that case, the law would have required clear evidence of a positive declaration of the intent to revoke at the time such declaration was made; or some act done with the intent thereby to revoke; and the jury would have had to determine whether in fact such declaration was made or act done.

Some doubt has been entertained whether any declaration could be sufficient without the word "revoke;" but, upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose.

But, further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits. And this appears to be tantamount to an inquiry whether conduct *can* give a positive declaration of intent. If it can, there can be no more *necessity* for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings, connected with the will, as must fully convince every rational mind that

the testator intended to revoke his will, and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part.

This proposition is not inconsistent with any authority in our books. Any doubt that may rest upon it may probably be the result of our habit of considering the subject since the Statute of Frauds. That law, one of the wisest in principle, though far from being complete in its details or fortunate in its execution, enacts certain formalities for giving effect to the revocation of a will; and the obvious good sense of that provision has in some way embodied itself with our ideas of revocation. But the law with respect to wills not within that Statute is the same as it was before the Statute.

This use was made of our former decision between the same parties: the will was intended to be revoked by burning, but the burning was not complete, and the will was held not to be revoked; it follows, as the revoking act was not performed, that there was no revocation. But this is clearly a fallacy. Burning the will is one of the modes of revocation permitted by the Statute of Frauds: it follows that there must be burning of the will to some extent to satisfy the enactment: but this is a case of revocation at common law, which only requires evidence of intention; and that evidence may be found in an imperfect act or a mere attempt. The duty then of the judge, in trying a question as to such revocation of a will, was to lay before the jury the facts proved, and ask whether they amounted to a revocation. This was done on the present occasion: there was certainly evidence from which the inference might be drawn, and by which we think it was warranted. On this point, then, there is no ground for a new trial.

There was one other argument which requires notice. The testator was aware that his devisee had taken the will off the fire; he expressed his annoyance that she had recovered possession of it, and his intention to make a new will instead of it; yet he took no further steps towards its destruction or the making a new will. He was therefore said to acquiesce in its continuance; the revocation itself was said to be revoked and the will revived. This state of things may certainly exist: and, if there was evidence of it, such evidence ought to have been submitted to the jury. But we cannot think that the mere knowledge of the continuing existence in specie of a will intended to be destroyed, when accompanied with no wish to restore its efficacy, but, on the contrary, with great displeasure at its rescue from the flames, does constitute such evidence.

The recent Act (7 W. 4 & 1 Vict. c. 26) for amending the law of wills will probably prevent any future agitation of a question like the present, as the third section makes all property devisable, and the twentieth and twenty-second prescribe the mode of revoking wills and of reviving such as may have been revoked.

Rule discharged.

HOBBS v. KNIGHT.

PREROGATIVE COURT OF CANTERBURY. 1838.

[*Reported 1 Curt. 768.*]

JOHN HOBBS¹ died March 7, 1838; after his death there was found among his papers a will dated January 19, 1835, with three codicils written on the same paper, the first without date, the other two dated February 25, 1837. From this will the signature of the deceased was cut out. There was also found a will dated February 17, 1838, which was invalid, because not attested as required by the Wills Act, 7 Wm. IV. & 1 Vict. c. 26 (1837).

An allegation, propounding the will of 1835 with the codicils, was brought in on behalf of one of the executors. It set forth that the will was in a perfect state until after January 1, 1838 (when the Wills Act came into operation), and that the testator knew that witnesses were necessary to give validity to the will of 1838. The widow opposed the admission of the allegation.

Phillimore, for the widow.

Lushington, in support of the allegation.

SIR HERBERT JENNER. The purport of the allegation, which now stands for admission before the court, is to show that the will executed by the deceased in January, 1835, remained entire and complete until after the commencement of this year (1838), when the Act of her present Majesty, entitled "An Act for the Amendment of the Laws with respect to Wills," came into operation; and the question is, Whether, under the circumstances stated in the allegation, this will is revoked? The admission of the allegation was opposed on two grounds: first, that the Act 1 Vict. c. 26, does not apply to this case at all; that the law applicable to the paper, is that which existed before the 1st of January, 1838. Secondly, that if the Act does apply, the excision of the signature of the deceased is a sufficient revocation of the will with reference to the provisions of that Statute.

On the other hand, it has been argued that the allegation is admissible on these grounds, —

First, that the Act does apply;

Secondly, that the excision of the name is not a revocation under the Statute; and

Thirdly, that supposing a will may be revoked under the Statute by the excision of the name of the testator, still, that in this case, the deceased did not intend to revoke the will until a second will should have been duly executed, which not having been done, that the will before the court remains unrevoked.

[The judge then considered the first question, and determined that the Wills Act did apply. He then continued: —]

Assuming, then, that the Statute applies to the case before the court, the next question is, Does the cutting out of the signature of the testa-

¹ The following statement is substituted for that in the report.

tor, the rest of the paper remaining entire, amount to a revocation of the will? In order to determine the effect of this act (the excision of the name of the testator) we must consider what is necessary to create a valid will under the Statute. The ninth section of the Statute is to this effect, "That no will shall be valid, unless it shall be in writing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." It appears, then, that the signature of the testator is necessary to the validity of a will; that no will is valid without it, so that it is not only a material part, but an essential part, without which a will cannot exist.

A will being so executed, the next question is, How is it to be revoked? The 20th section provides, "that no will or codicil, or any part thereof, shall be revoked, otherwise than as aforesaid" (that is, by marriage, under the 18th section) "or by another will," &c., which does not apply to this case, "or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same." Assuming then that this act was done by the deceased, it must be taken to have been deliberately done; the effect of that act is now to be considered. The signature of the testator being, as I before said, an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing, is destroyed, how the thing itself can exist. There can be no doubt that if the name of the testator had been burned or torn out, the revocation would have been as complete as if the will had been torn into twenty pieces. If this were not the case, it would lead to many absurd consequences. But it has been argued, that as the present Act of Parliament has pointed out certain modes with regard to the revocation of wills, the court cannot go beyond the express terms of the Act; that the words being confined to burning, tearing, or otherwise destroying, omitting the terms "obliterating" and "cancelling" used in the Statute of Frauds; there must be an actual burning or tearing, or as to "otherwise destroying," that the whole instrument must be destroyed; that the cutting, in the present case, is not tearing — (burning is out of the question) — and the instrument not being destroyed, that there is no revocation; and upon this part of the argument, the case of *Doe dem. Reed v. Harris*, 6 Ad. & Ell. 209; 1 Nev. & P. 405, in the Queen's Bench, was referred to, in which the testator had thrown his will on the fire, with the intention of destroying it, and a part of the cover was burned, but there being no burning on the instrument itself, the judges of that court held that the will was not revoked; that the words of the Statute of Frauds had not been complied with. But that case is not applicable to the present point, for here a part of

the will, the most essential part, is removed, and if in that case the name of the testator had been burned or torn off, I think the Court of Queen's Bench would have held that to be an effectual revocation by burning or tearing, for, according to the judgment in that case, it was not required that the whole will should be burned or torn. The learned judges do not say how much it is necessary should be burned, but Mr. Justice Coleridge says it is sufficient if the entirety of the will is destroyed; his expressions are these, "We were pressed with the argument: Must the whole of the document be destroyed? I say no; but there must be a destruction of so much as to impair the entirety of the will, so that it may be said that the will does not exist in the manner framed by the testator." So I say here, Is not the entirety of the will destroyed by the removal of the signature of the testator? It is true this is not an act of tearing, in the strict sense of that term; but, if the circumstances of this case required it, I think it would not be difficult to show that a will might be revoked by cutting with an instrument as well as by tearing, if a corresponding effect be produced by the one act as by the other. The Latin equivalent for the verb "to tear," is *lacerare*, but I find, upon looking into the dictionaries, that *exscindere*, "to cut out," is also used in the sense of "to tear," and Cicero uses the phrase "*exscindere epistolam*" (which is remarkable), with regard to the destruction of a document. But it is unnecessary to enter further into the consideration of this point, for, consistently with the true construction of the Act of Parliament, and the decision of the learned judges of the Court of Queen's Bench, it is not necessary, in order to bring the act within the meaning of the words "otherwise destroying," that the material of the bill should be destroyed; it is sufficient, as it appears to me, if the essence of the instrument (not the material) be destroyed. Suppose a will to be written in pencil, and the words were removed by means of Indian rubber; could there be any doubt that that would be a sufficient revocation? Cutting is a mode of destroying as effectual as tearing, and it appears to me that if tearing a will to this extent be a sufficient destruction of it, the same effect must be attributed to the act of cutting it; what would be the consequences of a different construction? Suppose a will were torn into two or more pieces, the will, no doubt, would be revoked; but if it were cut into twenty pieces with a knife, that would be no revocation, and if the pieces could be collected and pasted together, the will must be pronounced for by the court. I cannot conceive it possible that it was the intention of the Legislature to leave the law in that state. The question then comes to this: whether this be or be not a destruction of the will. I consider the name of the testator to be essential to the existence of a will, and that if that name be removed, the essential part of the will is removed and the will is destroyed; otherwise the Statute does certainly not deserve the title it bears, namely, "An Act to amend the Laws with respect to Wills."

It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration hav-

ing been advisedly omitted by the Legislature ; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to a will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence *aliunde*, how would this operate with respect to the 21st clause of the Act, which enacts, " that no obliteration, interlineation, or other alteration, made in any will after the execution thereof shall be valid, or have any effect, except so far as the words, or effect of the will before such alteration, shall not be apparent"? By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation *pro tanto*. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the Legislature that it should be sufficient if the name of the testator was so obliterated that it could not be made out: it never could be intended that a testator might revoke his will *pro tanto*, and yet not be at liberty to revoke the whole will.

Lushington. What does the court say as to the names of the two witnesses? By a parity of reasoning there would be a revocation by the obliteration of the names of the attesting witnesses.

SIR HERBERT JENNER. I think so too ; and if any such case should occur, I should think that if the names of the attesting witnesses were erased by the testator *animo revocandi*, it would be a sufficient revocation. It might be difficult to make it appear that the names of the witnesses were erased *animo revocandi* ; but if it could appear, I should be of opinion that it would amount to a destruction of the will, within the meaning of the Act of Parliament. I do not think that the words "*otherwise destroying*" mean that the material of the will must be destroyed, but that it must be something which would amount to a destruction of the will itself.

I am then of opinion that the 34th section of the Act of Parliament did not exempt the deceased in this case from the necessity of complying with the requisites of the Act, as to the manner in which this will was to be revoked ; and secondly, that the act done to the will (the excision of the name) amounts to a destruction of the will within the meaning of the Statute.

With respect to the further point, whether the excision of the name was intended only as a revocation, upon a new will being duly executed, I am of opinion that the case of *Onions v. Tyrer*, 1 P. Wms. 345, referred to in the argument, does not apply to the circumstances of this case, because in that case the deceased believed that the last will was a valid will, and on that supposition he proceeded to annul the former will ; while in the present case, it is pleaded in the allegation that the deceased knew that two witnesses were necessary to the due execution

of a will, and therefore that the paper before the court could not have any effect.

The court rejects the allegation.¹

PRICE v. POWELL.

EXCHEQUER. 1858.

[Reported 3 H. & N. 341.]

POLLOCK, C. B.² This was an action of ejectment brought by the heir at law against the devisee under a will.

The cause was tried before *Mr. Justice Crowder* at the Summer Assizes for Brecon, when a verdict was found for the plaintiff, with liberty for the defendant to move to enter a nonsuit or verdict for the defendant, on the ground that the act done by the testator in order to revoke his will was not sufficient within 1 Vict. c. 26, § 20. *Mr. Grove* accordingly obtained a rule for that purpose in Michaelmas Term. Cause was shown on the 10th and 11th of February at the sittings out of term. But as the court was not then full, and the question turns upon the meaning of the new Statute of Wills on the subject of a revocation, and the language of the 20th section of the 1 Vict. c. 26, differs from that of the 6th section of the Statute of Frauds, and is to receive a judicial construction as to this (we believe) for the first time; the court directed a second argument, which took place on Saturday last.

At the trial the jury found that it was the intention of the testator to revoke his will, and what he did was with that object. The will itself was on one sheet of paper, forming two leaves with four pages, and was executed in this form: "And in witness hereof I have to this my last will and testament, contained in four pages, set my hand and seal, that is to say, to the first three pages hereof I have set my hand, and to the last page I have set my hand and seal: this, &c. CHARLES PRICE. (L. s.)" And the attestation stated it to be "signed, sealed, published," &c. The testator in order to revoke it tore off the seal, tearing with the third leaf (on which in the fourth page the seal was placed) a similar portion of the first leaf on which were the letters "ral," being the final syllable of the word "funeral." The question

¹ In *Goods of Morton*, L. R. 12 P. D. 141 (1887), the signatures of the testatrix and of the attesting witnesses were "scratched out as if with a penknife." *Burr, J.*, held that the will was revoked. He said, "What the testatrix did may be regarded as a lateral cutting out. The paper is not pierced but the signatures are scratched away."

In *Townshend v. Howard*, 86 Me. 285 (1894), the testator crossed off his signatures with a pencil. *Held*, that the will was revoked. The court said, p. 288: "If that which is essential to the validity of the whole will is cancelled or obliterated, *animo revocandi*, the whole will is revoked."

² The opinion only is given.

is, whether this was a sufficient "tearing" within the meaning of the 20th section of the 1 Vict. c. 26, the words of which are — "by burning, tearing, or *otherwise destroying* the same" (*i. e.* the will). It was admitted that the word "destroying" did not import physical destruction; but Mr. Grove contended that the change of expression in the new Statute ("*cancelling and obliterating*" being left out, and "*otherwise destroying*" being introduced instead) imports that some act must be done so far destroying the will as to raise in itself a presumption (independent of other evidence) of an intention to revoke, and that merely tearing off the seal is not such an act, inasmuch as a seal is not at all essential to a will.

Very little assistance is to be derived from the previous cases in construing the altered expression in the Statute. There can be no doubt that prior to the new Statute a will found in the testator's possession with the seal torn off was deemed to have been cancelled: *Davies v. Davies*, 1 Lee Eccl. Rep. 444; *Lambell v. Lambell*, 3 Hagg. 568. At that time any tearing done with the intention of revoking had been held sufficient. The expression upon which we have now to put a construction is "by tearing or otherwise destroying;" and as it was admitted (and we think could not be denied) that actual destruction was not necessary, it becomes a question of degree, whether what was done in this case was sufficient; and in such cases, and indeed in all similar cases, we think it would be discreet not to lay down any general rule applicable to cases and circumstances which have not been the subject of argument before us, but to confine our judgment to the case at bar. And in our opinion as this will professed to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator professed to execute and to publish to the attesting witnesses, and through them to the world. It was, to use the expression of Mr. Justice Coleridge in *Doe d. Rees v. Harris*, 6 A. & E. 209, "destroyed in its entirety," and ceased to be (by means of tearing) the instrument as and for which it had been published. We are therefore of opinion that the act of tearing in this case was sufficient, and that the will was thereby revoked, and the rule to enter a nonsuit or verdict for the defendant must be discharged.

*Rule discharged.*¹

*Mellish, Hugh Hill, T. Allen, and G. B. Hughes, for the plaintiff.
Grove, Giffard, and Bowen, for the defendant.*

¹ See *Williams v. Tyley*, H. R. V. Johns. 530 (1858); *Leonard v. Leonard*, L. R. [1902] P. 248.

BLACK v. JOBLING.

COURT OF PROBATE. 1869.

[Reported L. R. 1 P. & D. 685.]

LORD PENZANCE.¹ In this case the deceased had executed several wills; but at the time of his death no valid will was found. In the hands of a legatee, however, was a document which purported to be a codicil, and is dated October 19th, 1867. It recites that the deceased had already bequeathed to his grandchildren the lease, stock, and profits, with everything relating to the farm of Fenham Hill, and gives in addition to each of them £300. The question is, whether this paper can be admitted to proof. It speaks of a bequest of a certain farm, which is contained not in any will of the deceased, but in a deed of gift executed by him on the 25th of May, 1867. The general proposition in relation to codicils is, that a codicil stands or falls with the will to which it belongs. This general proposition is subject to certain exceptions, and my first consideration will be, What were the exceptions under the old law? The result of my inquiry into this matter is very unsatisfactory. The first case reported is that of *Barrow v. Barrow and Others*, 2 Phillim. t. Lee, 335. The deceased in that case had executed a will and codicil. By the codicil he gave the residue of his property to his wife. He then burned his will. The court said, "As to the codicil it was clear that by the law of England it was not destroyed by the burning of the will, but was a substantive instrument or testamentary schedule, and as in this case the testator intended to die testate, considered it as his will, and declared he intended his wife should have almost all, agreeably to the codicil, I pronounced for the validity of it as a testamentary disposition." And yet, in that case, the codicil only disposed of the residue, and it was not possible to ascertain the extent of the term "residue" without the will. The next case was *Medlycott v. Assheton*, 2 Add. 229, in which the deceased executed a will and codicil. By the codicil she gave £100 each to two trustees named in her will, and divided some trinkets amongst her family. She afterwards ordered the will to be destroyed, which was done, but she preserved the codicil uncanceled, and it was found in her writing-desk. Sir G. Nicholl said, "A codicil is *prima facie* dependent on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of and unconnected with the will, that under the circumstances the codicil has been established though the will has been held invalid. It is a question altogether of intention, consequently the legal presumption in this case may be repelled merely by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption." In *Tagart and Bukevell v.*

¹ The opinion only is given.

Hooper, 1 Curt. 289, the codicil was headed, "This is a codicil to my last will, and to be taken as a part thereof." Sir H. Jenner, in pronouncing for its validity, said, "In all the cases referred to, there were circumstances which showed that the codicils were dependent upon the wills; there is nothing here to show that the codicil was contingent upon the existence of the will." The court, therefore, in this case, suggests a presumption contrary to that raised in the other cases; for it decides that, to make the codicil invalid, there must be proof that it was intended to be dependent on the will. The consideration of these cases leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense any codicil that makes any disposition of property at all, must be considered to be dependent on the will, which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dis severed from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the court in adopting it. But all these cases occurred before the Wills Act. Now the 20th section of that Act is most distinct and positive in its terms. "No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, . . . or by the burning, tearing, or otherwise destroying the same by the testator . . . with the intention of revoking the same." And I should have had no hesitation in holding that the intention of that section was to do away with all these implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first was *Clogstoun v. Walcott and Others*, 5 N. C. 623, in which the only observation bearing on this point, made by Sir H. J. Fust, was, "Under the old law the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law, there must be an intention to destroy." The other was the case of *Grimwood v. Cozens and Others*, 2 Sw. & Tr. 364, in which Sir C. Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was

prima facie dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the Statute. The question then is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for the probate of the codicil alone, that it was intended that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." Now, in reviewing these decisions, I cannot perceive that the effect of the Statute has been fully considered by the court. Sir C. Cresswell seems to have thought that it had been decided that the Statute made no difference, and passed it by as having been so decided; and Sir H. J. Fust dismissed the point without any reasoning whatever, merely affirming that the Statute had made it necessary that there should be an affirmative intention to revoke. But the Statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the Statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the Statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to be admitted to proof.¹

Dr. Deane, Q. C., and *Pritchard*, appeared for the plaintiff.
Staveley Hill, Q. C., and *Dr. Tristram*, for the defendant.

SWINTON v. BAILEY.

HOUSE OF LORDS. 1878.

[Reported 4 Ap. Cas. 70.]

THIS was an appeal against a decision of the Court of Appeal, which had reversed a previous judgment of the Exchequer Division.

On the 16th of November, 1826, one Joseph Ely (or Eley), of the county of Lincoln, made his will, which recited that he was seised in fee simple of certain land in the parish of Kyme in that county, and that he was desirous in case of his death to make a provision for his mother, Elizabeth Ely, and he gave the said lands, &c., to his mother "to hold unto her, the said Elizabeth Ely, her heirs and assigns forever." He bequeathed to her also his personal property, and made her his executrix. The will was attested by three witnesses, and the attestation clause formally noticed two interlineations, — the word

¹ See, accord, *Goods of Savage*, L. R. 2 P. & D. 78 (1870); *Goods of Turner*, L. R. 2 P. & D. 403 (1872); *Gardiner v. Courthope*, L. R. 12 P. D. 14 (1886). *Contra*, *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 206 (1876). See *Goods of Bleckley*, L. R. 8 P. D. 169 (1883).

“ simple ” after the word “ fee,” and the word “ other ” in the clause revoking all *other* wills. There was, however, an obliteration which the attestation clause did not notice. In the body of the will the following words in the gift to the mother, “ Ely, her heirs and assigns forever,” had been struck through with a pen, but the obliteration being more extensive than was intended, the word “ Ely ” had been re-introduced, and the gift read thus, “ to hold to my said mother Elizabeth Ely,” the other words continuing obliterated. The testator died in April, 1836, and his mother proved the will. There was no direct evidence relating to the making of the obliterations. But when the will was propounded for probate, on the 17th of June, 1836, Elizabeth Ely made an affidavit, stating that on the death of the testator she made search for the will and found it, and observed the erasures, and she swore that the will as then produced was in the same state as when she found it. Probate was granted to her, and she entered into possession of the property. On the 14th of December, 1853, she made a will devising all her real estate whatsoever and wheresoever to her nephew, Jacob Swinton (the father of the appellant), in fee simple. Elizabeth Ely died on the 11th of October, 1859, and on the 14th of November, 1859, the respondents (claiming as co-heiresses-at-law of Joseph Ely) brought an action of ejectment against Jacob Swinton to recover possession of the premises. He at first defended the action, but then withdrew, and the plaintiffs in the action had possession delivered to them. On the 1st of February, 1875, the present appellant, as the heir-at-law of the devisee Jacob Swinton, brought ejectment against the present respondents to recover possession. The cause was tried on the 17th of March, 1875, before *Mr. Justice Brett*, without a jury. A verdict was entered for the now respondents, but leave was reserved to the appellant to move to enter it for him. A rule was accordingly obtained, and on the 18th of November, 1875, judgment in the Exchequer was delivered in favor of the appellant. The case was taken to the Court of Appeal, and on the 2d of February, 1876, that judgment was reversed. 1 Ex. D. 110. This appeal was then brought. In consequence of proceedings in the court below, it was here taken as established that the alterations and erasures had been made by the testator himself.

Mr. Benjamin, Q. C., and *Mr. T. R. Bennett* (*Mr. Biale* was with them), for the appellant.

Mr. Wills, Q. C., and *Mr. Mellor*, Q. C. (*Mr. Dunning* was with them), for the respondents.

THE LORD CHANCELLOR. (EARL CAIRNS.) My Lords, this is the case of a will fifty years old, the will having been made on the 15th of November, 1826. The question is important, no doubt, to the parties in the present case, but it is not of any very extended importance with reference to other wills.

The will is that of a testator of the name of Joseph Ely, who appears to have been resident in the county of Lincoln. As the will

originally stood it ran thus: [His Lordship here read the words of the devise].

Subsequently (as it must now be taken) to the execution of this will, an obliteration was made in it; and it must also be taken, for the purpose of the present appeal, that that was an obliteration made by the testator himself. The obliterations consisted in this: In the devise of the real estate, after the word "Elizabeth" the testator struck out "Ely" ("Ely" evidently having been struck out by mistake, for he restored it; but that makes no difference); and he also struck out the words "her heirs and assigns forever." In the bequest of personalty also, after "Elizabeth Ely," the words "her executors, administrators, and assigns absolutely," are struck out. I refer to that, because I think it not unimportant in reference to the first observation which arises on the matter.

Now, my Lords, I think you cannot for one moment doubt that, putting aside all legislation upon the subject, looking to the character of the obliteration which was here made, and to the fact (which must be taken to be admitted) that it was done by the testator, this was an alteration made deliberately with a set purpose, having reference both to the real and to the personal estate, and operating or being intended to operate in the same way with regard to both. I do not stop to consider whether it had the same operation upon the personalty as it had upon the realty; probably it had not. But it is obvious that the person who made the obliteration desired to remove, in the one case and in the other, the limitation of the words which had been super-added to the name "Elizabeth Ely," the words with regard to the real estate being "her heirs and assigns forever," and with regard to the personalty, "her executors, administrators, and assigns absolutely." That it was done therefore, putting aside the question of statutory enactment, *animo revocandi*, there cannot, I think, be any doubt whatever.

That, my Lords, being the state of the facts of the case, what is the legislation which it is necessary for your Lordships to look at upon the subject? Was this obliteration effectual with regard to the real estate to alter the devise, so that whereas Elizabeth Ely, under the will as it originally stood would have an estate in fee simple absolutely, under the will as obliterated she would have only an estate for life? Now, my Lords, the Statute which has to be looked to with reference to that question is the Statute of Frauds. The 6th section of the Statute of Frauds consists of two parts, and I will, in the first instance, read the first part of it: [His Lordship read it]. That is the first part of the section. The second part is put in apposition to the first, and, as I took the liberty of suggesting during the argument, it seems to me to be inserted for the purpose of constituting an equilibrium between the two portions of the enactment. It runs thus: [His Lordship read it].

My Lords, I think that, in reality, your Lordships need apply your

attention to no more than the first half of the section, because it must be obvious that the object of the Legislature was, in the second part, merely to declare affirmatively the consequence which resulted from the first part. The reference to the first part of the section, by the use, in the second part, of the words "in manner aforesaid," shows that it was not intended by the second part to cut down whatever might be the operation of the first. Now the first part is expressed negatively, but involved in it there is really an affirmative enactment. The Statute of Frauds had provided that there should be no will, devising lands validly, unless it was executed and attested in a particular way; but, then, a will being valid under the first part of the Statute, there is, in this section, a provision as to revocation; and I take the first part of the 6th section to enact, in substance, this: "That a devise in writing of lands, and any clause thereof, shall be revocable by burning, cancelling, tearing, or obliterating the same by the testator himself;" that is, by burning, cancelling, tearing, or obliterating the devise, or any clause thereof. And inasmuch as you have the words "burning" and "cancelling," which apply to a material object, you obtain from that the obvious proof that "devise" must mean the will, the written paper executed in the manner provided by the Statute.

The enactment therefore is that the will may be revoked, and any clause in the will may be revoked, by burning, cancelling, tearing, or obliterating the same, or by another writing executed in the manner provided by the Statute. Those are the two ways in which a revocation may take place. Of course, from the very nature of things, those two ways are not co-extensive. You will of course be able, by means of a fresh writing, to produce results much more extensive than you can produce by cancelling or obliterating; but where you can produce results which are intelligible by cancelling or obliterating, the Statute allows you to do it; where you cannot attain the end and object which you have in view by cancelling or obliterating, you must resort to the larger and higher means of making another writing. Of course you may by the other writing produce every result that you can produce by cancelling or obliterating; but it does not follow that by cancelling or obliterating you can produce every result that you can produce by a different writing. The one is a lower form, a lower power of alteration than the other; the other, that is to say the fresh writing, is the higher power.

That, my Lords, being the scheme of the Statute, let me apply it to what is done in the present case. You have here a devise "to Elizabeth Ely, her heirs and assigns, forever," and the testator obliterates the words "her heirs and assigns forever" (I overlook the obliteration of the surname "Ely," as it is immaterial), leaving it to stand a devise to Elizabeth Ely; so that she takes under a devise which does not go beyond her own life, and does not pass to heirs. Now, I ask in the first place, Why is that not within the Statute? The Statute speaks of any clause in the devise, (which I take to mean in the will,) being obliterated by the testator. Are the words "her heirs and assigns

forever" not a clause in the will? Why not? It has been suggested that a clause must mean something self-contained, and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word "clause." When I read an enactment speaking of a devise, that is to say, speaking of a will or any clause in a will, I naturally infer that the word "clause" there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the clause itself must be capable of being read as a document by itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate *de jure* under the Statute, is something in the first place which you can obliterate *de facto*; because if the obliteration cannot be made *de facto*, then of course the Statute allowing it to be made must be inoperative. Now in this instance, *de facto*, the obliteration can be made. If you strike out the words "her heirs and assigns forever," the will reads as accurately as the most skilful conveyancer could have worded it. It is complete and perfect in every point.

Then, my Lords, is there any decision which says that the word "clause" must be taken in the limited sense which is assigned to it? I know of none. On the contrary, when I look to the cases which have been referred to, viz., *Larkins v. Larkins*, 3 B. & P. 16, 109, and *Short v. Smith*, 4 East, 419, it appears to me that in those cases no such meaning was supposed to be attached or to be attachable to the word "clause."

But, my Lords, I must go farther. I must say that if we are to resort to first principles, and to a technical examination of the character of the words which are here obliterated, as I understand the rule of law it is, that where you have a devise "to A. B. and to his heirs and assigns forever," in the eye of the law that is a devise to A. B., and a devise to his heirs and assigns forever. The law says what the words say, — that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

Therefore, whether I look to the words of the Statute, to what must be the popular meaning (having regard to the Statute) of the term "clause," or whether I look to the legal signification of the devise to the heirs of Elizabeth Ely, in the one case, and in the other, I find that there is something which in my judgment can be removed out of the will by obliteration, something which, when obliterated, is revoked, something which the testator, having written, desires to recall, and which he is allowed to recall, and to treat as *pro non scripto* by the process of obliteration provided for by the Statute.

My Lords, I therefore am clearly of opinion that the conclusion arrived at by the Court of Appeal in this case was a correct one; that the striking out of the words was justified by the Statute; and that the will for the purposes of the devise is to be read as if those words had never been included in it.

I therefore submit to your Lordships that the appeal should be dismissed, with costs.

LORD PENZANCE. My Lords, the question in this case turns entirely upon the meaning of the sixth section of the Statute of Frauds; and I agree with what has just been said, that although the form of the section is negative yet it contains within it an affirmative proposition. I read the earlier part of the section as being a power conceded to a testator to revoke by cancelling, burning, obliterating, or by another writing properly executed, some portion, at least, of his testamentary disposition. Now, in considering to what extent that power was intended to be given, of course we must have regard to the precise words of the section. It would run in the affirmative form in this way: "Any devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall, at any time after a certain date, be revocable by any other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or by others in his presence and by his directions and consent." Now, to begin with, what is the meaning of the word "devise"? The previous section says that all devises of lands "shall be in writing and signed by the party so devising the same;" and then the sixth section speaks of "a devise in writing of lands, tenements, or hereditaments." I understand by that language that the meaning of the word "devise" is those words reduced into writing which carry with them a disposition of land. "Devise" does not mean the whole will, because there may be many other things in the will that have nothing to do with the devising of lands; but it means that group or collocation of words reduced into writing which operates as a disposition of the testator's lands. Now this section obviously gives a power to revoke any such devise when it has been made, by burning, cancelling, tearing, or obliterating those words, and if the whole of such words were obliterated it would entirely revoke the devise. It further gives the testator power to revoke the devise "by some other will or codicil in writing" (that is, a complete will or codicil) "or other writing declaring the same." Declaring what? Why, declaring that he had revoked or intended to revoke the devise. So far no one would dispute the construction of the section.

But, my Lords, in addition to that a power is conferred upon the testator to revoke "any clause" of his devise. Now, what is the meaning of those words? My Lords, I have read with great attention and care the decision of the learned judges in the Court of Exchequer, and I find that the learned Lord Chief Baron has considered that the words, "any clause thereof," that is to say, any clause of the devise, necessarily mean words which contain within themselves a devise;

because he says in express terms, "It is the entire devise and bequest, and must remain in force until cancelled in the manner pointed out by the Statute." Then he refers to the cases, and then he says, speaking of the case of *Larkins v. Larkins*, "There, was a complete devise as regarded those two persons, and the alteration operated as to what was struck out: it was a complete revocation as to that particular trustee, and, if so, it comes within the words;" that is to say, he looks upon the case of *Larkins v. Larkins* in this light: he says that although it was one sentence, yet it really contained within it two complete devises; and, inasmuch as the one name was struck out, it was within this clause of the Statute of Frauds, because the striking out operated as a complete revocation of that entire devise.

Therefore, my Lords, it seems to me that the learned judge whose judgment I have been reading considered that in order to bring a case within this section of the Act of Parliament it was necessary that the thing which was struck out, and which was to be revoked, should be a set of words containing a complete devise. But it is obvious that it was not necessary for the learned counsel for the appellant in your Lordships' House to go so far as that, and I do not think he did go so far; he was content to take his stand upon a narrower ground than that; he said that the words "the devise or any clause thereof" must mean some independent sentence, some set of words which have an independent meaning of their own without reference to any context; and he said that if there were such words as those, no doubt a testator might, either by another and properly executed instrument, or by striking his pen through them, get rid of and revoke such words. But, my Lords, I am not aware that there is anything in the Statute which justifies that interpretation. When you speak of a devise (meaning thereby what I have already suggested, viz., a set of words carrying with them a disposition of lands) and when you say that it may be revoked in the whole, or that any clause thereof may be revoked, it seems to me to be putting a construction upon the Statute for which there is no warranty in the language, to say that that clause must be an independent sentence. One can easily see, by putting an illustration, that no reasonable object of the Legislature would be effected by such a mode of construction, because, as I think was put in the course of the argument, if in this case, instead of the words "her heirs and assigns forever," the sentence had stopped at the words "Elizabeth Ely," and then in a subsequent sentence it had run in this way: "And I further declare that after the death of my said mother the said property shall go to her heirs and assigns forever," you would have had an independent sentence, and there, according to the construction contended for, the devise might have been revoked in that respect without touching the rest of the will. My Lords, it is hardly conceivable that the Legislature intended in this section to make a distinction between two things that are identical in effect, the only difference between them being that in the one case the words which carry the devise, or carry the bene-

ficial intention into effect. are to be found as portions of a larger sentence, whereas in the other case they form an independent sentence. One cannot see any reason for such a mode of legislation. If the intention was to allow a part of a devise to be revoked, there seems to me to be no object in confining the power so to revoke to cases in which the part to be revoked found a place in some independent sentence.

But, my Lords, upon this point of the matter, what say the cases that have been referred to? The two cases that have been cited appear to be the only cases that have arisen; which certainly is a very remarkable circumstance. The Statute of Frauds was not passed yesterday, and the thousands and thousands of wills which, since the passing of the Statute, have had words struck out of them, one would have thought would have given rise to this question, if the matter had been doubted. After all, only two cases have been produced to your Lordships' House in which the matter has in any way been raised. In both those cases, as I understand it, it was not doubted that you could get rid of a devise to A. B. by striking out the name A. B. But A. B. is not an independent sentence; it has no meaning in itself; a man's name standing alone without any context has no meaning whatever; it is no part of a testator's express disposition to use the word A. B. or the words "John Brown." It seems to me, therefore, that those cases, so far as they go, proceed upon the idea that the words "any clause thereof" are not to be confined to cases in which there is some entire independent sentence, which, standing alone and entirely free of context, has a meaning of its own.

But, my Lords, another matter has been touched upon. It is not necessary for the determination of this case, because here the effect of what has been done has not been in any way to increase, but on the contrary, to decrease the interest that Elizabeth Ely took. But I confess that I have been wholly unable to appreciate the arguments which have been used elsewhere, and to some extent in this House, upon the question whether, supposing it to be established that this section of the Statute of Frauds really did give to the testator the power to revoke a portion of a devise, — that is to say, a portion of the words constituting a devise, — that power would cease to exist in a case where the effect of revoking a portion of the words used would be to increase, and not to diminish, the interest of the taker. If that construction is to be put upon the Statute, it ought, I think, to have some words from which that inference could be drawn. The Statute says, You may revoke a portion of those words constituting the devise if you like; but it says nothing about the effect. Of course it is easy enough to put hundreds of instances in which, as suggested by the Lord Chancellor, there having originally been the words "without impeachment of waste," a testator strikes his pen through them, and there is then an end of that disposition. Then another case may be put, perhaps rather in the opposite direction; where A. and B. are joint tenants or tenants in common.

Whatever may be the restriction or qualification that is struck out, whether it may have a tendency to increase the benefit of the person in question or not, appears to me to be quite immaterial.

My Lords, the opposite idea, I think, is founded upon a view of the word "devise," which is contrary to what I have suggested to your Lordships as the proper view. As I understand, the idea involved in that argument is this: A devise is a gift; if a testator has made a gift to a man the Statute gives him power to revoke the gift or any part of it, and not only to revoke a part of the gift, but to give something more. Looked at in that light one understands the idea; but I venture to think that the word "devise" is not to be read in that way, but that a devise merely means a disposition of lands in words in writing, and that when you say that the testator may revoke "any clause thereof," that is, may revoke any portion of those words, it means any intelligible portion of those words, whether the effect is to increase the beneficial interest of the taker, or the reverse.

My Lords, I do not think that I need further discuss this matter. I am entirely of opinion that the judgment of the Court of Appeal gave the right construction to this section. The judgment in the Court of Exchequer appears to me to be far too narrow, because the result of it would be this: that if a man had made a devise in any form, and he wished to alter that devise without doing away with it, he could not do it at all except by a fresh will, that fresh will cancelling the first devise; he would have to make a new devise in the amended form that he might desire, and the power of obliterating and cancelling a portion, which was obviously intended by the words of the sixth section of the Statute of Frauds, would really come to nothing, because he could do nothing in the way of revocation except by revoking the whole and making a fresh disposition.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.¹

THE LORD CHANCELLOR. My Lords, I wish to say, in order to prevent misunderstanding, that the observations which I made to your Lordships were made only with reference to an obliteration which is a revocation in the proper sense of the term, that is to say, a cutting down or a taking away of something previously given. It is of course possible to conceive the case of an obliteration which might have the effect of enlarging that which before was given. Until a case of that kind arises, if it ever should arise, I wish to keep my judgment upon it altogether suspended.

Decree appealed against affirmed; and appeal dismissed, with costs.

¹ The speech of LORD O'HAGAN in concurrence is omitted.

WARNER v. WARNER.

SUPREME COURT OF VERMONT. 1864.

[Reported 37 *Vt.* 356.]

THIS was an appeal from a decree of the Probate Court disallowing the will of Isaac Warner deceased, and was tried by the jury at the Chittenden County Court, April Term, 1863, *Pierpoint, J.*, presiding, upon the plea, that the paper propounded was not the last will and testament of the said deceased.

The proponent introduced testimony tending to prove that two days before the death of said deceased, during his last sickness, he said to his wife (the proponent) that she would find in a trunk where he kept his papers, a will made out by him for her benefit; and that some three weeks after his death she examined the trunk and found among the papers the will in question, and that she thereupon presented the same to the Probate Court for probate. She also found there a former will with the testator's name partly torn off. The following facts were duly proved and not disputed, viz.: The paper propounded was dated August 22d, A. D. 1857. It was all in the handwriting of the deceased, except the names of the witnesses, and was folded and filed in the handwriting of the deceased, "Isaac Warner's last will and testament," and was in all respects duly executed, witnessed and published, at that date, as his last will and testament, he then being of sound disposing mind and memory. The deceased in the earlier part of his life was a practising lawyer in this State. He died at Burlington on the 11th day of August, 1861, aged 79 years, leaving no will of later date.

The contestants claimed that the deceased on the 15th day of March, 1859, cancelled said will with the intention of revoking it, and in support thereof offered to prove that the deceased at that date wrote on the same paper on which the will is written at the foot of the writing of the will, and on the back of the same paper, what appears there written, with the intention of revoking said will. This was objected to by the proponent, upon the ground that such writing was not such an act of cancelling as the law makes necessary for the revocation of a will, although the deceased might have done it with intent to revoke said will.

It appeared that the will was written upon a sheet of foolscap paper and covered the first page and about one third of the second page, and that thus far there were no marks of obliteration, cancellation, or defacement upon the paper. But upon the last half of the second page were written the following words: "This will is hereby cancelled and annulled. In full this 15th day of March in the year 1859," and several lines lower down upon the page are the following words, erased:—

"In testimony whereof I here I have."

Written lengthwise of the paper as folded, and below the filing of the paper upon the back, being the outside on fourth page, were these words: "Cancelled and is null and void. I. WARNER."

The court, against the objection of the proponent, admitted the testimony of one Charles F. Warner, which tended to prove that the testator intended the said writings upon the will as a revocation by cancelling, and that he first designed to make another will, but finally decided to make no will, but leave it to the law to divide his property.

Upon the testimony and facts proved, the proponent claimed, that the court should direct a verdict establishing the will. The court refused so to rule, and submitted the case to the jury. The proponent asked the court further to charge the jury upon several points presented, which the court declined to do.

The jury returned a verdict that said instrument was not the last will and testament of the said Isaac Warner deceased.

To the several rulings of the court, the refusal to charge as requested, and the charge as given, the proponent excepted.

Daniel Roberts, for the proponent.

Wm. G. Shaw and *E. J. Phelps*, for the contestants.

BARRETT, J. The main question in this case is, whether the will was revoked by the act of the testator, in writing what he did on the second page of the instrument.

The Statute prescribes the several and only modes in which a will, duly executed, may be revoked; viz.: 1st, by some will, codicil or other writing. 2d, by burning, tearing, cancelling or obliterating. It is clear, and is conceded, that this will is not revoked by either of the first of said modes; nor by either of the other modes, unless it be by *cancelling*. That is a mode by itself, different and distinct from burning or obliterating, though obliteration may in some cases be an act of cancelling. In the present case there is no obliteration. So the only question is, Was the act of the testator a *cancelling*, within the meaning and intent of the Statute?

We regard it as a settled doctrine of the interpretation of Statutes, that when an English Statute is enacted in this State, if it had received a judicial interpretation in England prior to its enactment here, it is to be taken that the language is used in our Statutes in the sense given to it by the adjudications in England, unless there is some other sense impressed upon it by attendant provisions of the Statute thus enacted. But if it had received no such interpretation, it stands for interpretation here the same as if it had been first enacted here. Adjudications in England, made since such enactment here, have not the force of authority, as to the sense of the language as used in our law. As resting on reasons that commend themselves to our approbation, all adjudications upon the subject may aid in giving to terms used a just sense and effect, having reference to the subject-matter of, and to the purposes designed to be served by, the Statute in question.

It is plain that the object of the Statute 29 Car. II. is the same as that for which our similar Statute was enacted; and, in the matter of wills, to provide ample security against their revocation being effec

tuated, unless by means insuring the utmost certainty that it was the intent of the testator to revoke what would otherwise stand for, and be effectual as, a will disposing of his worldly effects.

To this intent, the provisions in this behalf have been made. The class of acts of revocation, of which cancelling constitutes one mode, contemplates something to be done to the instrument itself, showing, or tending to show, that, by such act, the testator designed to make an end of it as his will; and each of the modes prescribed was designed to be equally effectual in that respect. If the document should be entirely burned up, or entirely obliterated, or torn into scraps, or covered over with closely drawn cross lines, there would be no doubt as to the intent of the testator. But it has been held not to be necessary to go to that extent in any of the modes, in order to answer the requirements of the Statute; and that the slightest degree of either mode, provided it appear, even by resort to other evidence, that the act was done with the intent to have it constitute a revocation, is effectual as such revocation. Accordingly it has been decided that the slightest burning or tearing of the material on which the will was written, even though none of the script should be destroyed or effaced, — that the erasure of a single word, or the drawing of a slight line across the face of the script, partaking of the character of the act prescribed by the Statute, if it appear to have been done in the accomplishment of such act, effectuates a revocation.

Now it is obvious, from the general current of the cases early and late, that the leading idea is, that the testator must perform some one of the prescribed acts upon the instrument itself, so that, when produced, it shall bear the mark of such act. What amounts to burning, to tearing, to obliterating, is not the subject of question. But what amounts to *cancelling*, — how, with reference to the text of the instrument, must the act be done, — not as to the shape or character of the marks, but *where* must they be located, is the main point of debate in the present case. The proponent claims that the cancelling marks must be made upon some part of the written text of the will.

The Latin verb, from which the term *cancel* is derived, means to make lattice work, and the corresponding noun in Latin, in the plural, *cancelli*, signifies lattice work; and when applied to marks, means marks made in the form of lattice work. How this term came to be applied to marks made upon written instruments, for the purpose of destroying their validity, is obvious both from general and judicial history, not only as taught by the books, but as derived from observation. To draw cross lines over the face of a written instrument has been, and is, a common mode of showing the intent, thereby, to make an end of it as an instrument in force. In earlier times, when the ability to write was possessed by very few, the great mass of persons of all grades from the highest lord to the lowest peasant, could manifest their intent, with pen and ink, only by unlettered marks. While they would be dependent on the few skilled in the art, to draw their instru-

ments of contract in making disposition of their property, they could and did resort to various modes, by which, without *clerkly* aid, to make an end of their validity.

From the fact that cross marks were so easily made, and, when made upon the face of a written instrument, were so significant that, thereby, the maker of them designed to put an end to the continuing validity of the instrument, this mode was recognized and adopted into the Statute, in common with tearing, burning and obliterating, as one by which wills might be revoked. In some instances, this mode might be preferable to either of the others, as when it should be desirable to preserve the legibility of the entire instrument, which might not happen as the result of burning, tearing or obliterating. While, therefore, a common and customary mode of manifesting the intent to abrogate the instrument, by drawing cross lines over the face of it, gave rise to the use of the term *cancel*, still the entire judicial history of the subject shows that *that manner* of marking an instrument is by no means essential in order to answer to the full force and effect of the term in its *legal* sense. The net result of all the cases and all the text-books, as well as the reason of the thing, and the appropriate analogies, seems to be this, — that, when the instrument is so marked by the maker of it, as to show clearly, whenever it is produced, that the act was designed by him to be a *cancelling*, that act becomes effectual, by force of the Statute, as a revocation of the will by cancelling.

In the present case the act of the testator was done, not only upon the paper on which the will was written, but upon such a part of it as always to go with that part of the will which contained the disposition of the property, — not indeed on the face, but on the back of such disposition. It is obvious that the *act* itself was designed to constitute a revocation by *cancelling*. This is not a mere memorandum or declaration, which, as such, operates a legal effect by force of the terms, but it was the performing of an act upon the instrument itself, which act operates the legal effect. If cross lines had been drawn over the face of the writing of the will, they would have been effectual, because they would have constituted an act done to the instrument, showing the intent of the testator, by that act, to destroy the validity of it. Instead of thus drawing lines, he equally performed an act to the substance of the instrument, and as inseparable from the written text as cross lines over its face, showing, with even clearer certainty, the intent, by that act, to destroy its validity. Instead of leaving the significance of informal marks to be fixed by the location they occupy, he formed the marks into letters and words expressive of their significance, and as effectually placed them upon the instrument, as if they had been made upon the face of the script of the will. If he had drawn a slight mark from the top to the bottom of the writing, though that would not have been *cancelli*, within the etymological and primary meaning of the term, still it is conceded that it would have been a *cancelling* of the will, if done with that intent, within the legal meaning of that term. We think

that writing upon the will, as was done in this case, as nearly answers to the primary sense of that term, as such mark would, and, having regard to the ground on which effect is given to an act of cancellation, such writing answers every reason and requisite of the law.

The case of *Lewis v. Lewis*, 2 W. & Serg. 455, comes nearer to a position of conflict with the view we hold, than any one to which attention has been called; yet its characterizing facts are so different from those of the case in hand, as, in our judgment, to relieve the two cases from any such conflict. In that case, the word "*obsolete*" was written by the testator on the margin, against a certain clause in the will. The court held that that did not, of itself, constitute a *cancelling*. There was no evidence, aside from what that word imported in that location, of the intention of the testator, as to the character and effect of the act of writing it. It was not a *cancellation* in the primary sense of the term, not being a *cross-marking* on the face of the writing. It was not in the wider sense accorded to it by the law, because it was not upon the writing at all, as and for a mark drawn over it. The word itself did not, in its position, indicate that the act of making it was designed to be an act of cancelling. It was so placed upon the paper that it might be separated and leave the written part of the will entire and intact. It might have been designed as a mere memorandum or declaration, to have effect as such, and not as the effectual fact which operates in virtue of the act of thus marking the instrument.

Several cases were cited in the argument, in which there had been erasures or interlineations, or both, and it was held that the wills were not thereby revoked, because it did not appear, on the one hand, to have been the intention of the testator to have the act constitute a *cancelling*, or, on the other, if so intended, that the act was completed by the testator having done all that he designed to do as constituting such act of cancelling. Such are *Winsor et al. v. Pratt et als.*, 6 E. C. L. 299; *McPherson v. Clark*, 3 Bradf. 95; *Martins v. Gardner*, 8 Simons, 73; *Clark v. Smith*, 34 Barb. 140.

The ground and reason of those and similar decisions are well stated, and cases referred to in Redf. on Wills, 315; also in 2 Am. Lead. Cases, 692, where it is said, "Although interlineations, intended to vary the sense of the will, and not to destroy it, cannot, in themselves, amount to a cancellation, there is no room for doubt, that, when taken in connection with actual erasures, they may go to make up the proof of a change of disposing purpose, and show a total or partial revocation of the instrument." And this is fully sustained by the authorities cited.

There is a class of cases of revocation by burning, tearing, or obliterating, in which the principle and its application seem to us to be precisely the same that we adopt and make in this case. Primarily, and most naturally, the terms used imply as the idea of the law, that the burning or tearing is to be such as, virtually, to destroy the will as an instrument, and not merely enough to indicate, or be consistent with, an intent to abrogate it; and the same remark is equally appli-

cable to a case of obliteration. Yet in *Avery v. Pixley*, 4 Mass. 460, it was held that taking off a seal, placed upon a will as a part of the act of executing the same, although the law did not require such seal, would operate a revocation by tearing, provided it was shown to have been done with that intent. So in *Moore v. De la Torre*, 1 Phillimore, 375, the will and codicil were cut around the margin at the top and one side, but no part of the writing was touched, except the attestation clause of the codicil was cut through. In this condition they were found in the room of the testatrix after her decease, in a box in which she had kept her papers; and on their being propounded for probate, Sir John Nichol, after a most elaborate argument, said: "It is the duty of the court to put a rational construction upon this act. In my judgment it must have been done for the purpose of cancelling, revoking and destroying the validity of this instrument. I can put no other rational construction on the act. It must have been done not equivocally, but decidedly, for the purpose of revoking the instrument." The case, on appeal, was fully and most learnedly argued in the High Court of Delegates, before seven most able jurists in this department of the law, and the judgment of the Prerogative Court was sustained. In *Bibb v. Thomas*, 2 W. Black. 1043, the will was so torn by the testator as almost to tear a bit off, and then rumpled together and thrown upon the fire, but it soon fell off, and was picked up by a servant, and preserved. By the whole court, De Grey, C. J. "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The Statute has specified four of these; and if these, or any of them, are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will or instrument itself be totally destroyed or consumed, burned or torn to pieces. The present case falls within two of the specified acts described by the Statute. It is both a burning and a tearing. Throwing it on the fire with an intent to burn, though it is only very slightly singed and falls off, is sufficient within the Statute." In *Reed v. Harris*, 33 E. C. L. 57, the doctrine of *Bibb v. Thomas* is fully asserted, but, in the last case, it was held that there must be an actual burning, to some extent, of the paper of the will. Patteson, J., said: "There must, at all events, be a partial burning of the instrument itself. I do not say that a quantity of words must be burned, but there must be a burning of the paper on which the will is." Similar cases, in which the same doctrine has been held, might be referred to; but such reference is needless, as there is no substantial conflict of decision.

Now, as before intimated, the acts of burning and tearing in the cases cited, are as far from answering to the most natural import of the words used in the Statute, as the act in the present case is from answering to the primary idea of making lattice work, or to the less restricted idea of drawing a cross, or even a single mark, on the face of the writing, in order to constitute cancelling.

On the whole, the true legal idea seems to be well expressed in 2 Am. Lead. Cases, 689, as follows: "All that is necessary to a revocation is an absolute revoking intention, manifested by any act, however slight in its nature, which can fairly be considered as a tearing, burning, cancelling, or obliterating, within the meaning of the Statute of Frauds, and the various legislative enactments which have been based upon it;" and in Williams on Executors, 110, that "the principle appears to have been established, that if the intention to revoke is apparent, an act of destruction or cancellation should carry such intention into effect, although not literally an effectual destruction or cancellation, provided the testator had completed all he designed to do for that purpose."

As to the extent to which such act of revocation must be done in order to be effectual, perhaps Mr. Justice Coleridge, in *Reed v. Harris*, *supra*, put as proper a general formulary as is to be found, or as can well be framed, thus: "The question is put whether the will must be destroyed wholly, or to what extent. It is hardly necessary to say; but there must be such an injury, with intent to revoke, as destroys the entirety of the will: because it may then be said that the instrument no longer exists as it was." This language was used with reference to burning or tearing, as a mode of revocation. Applying it to *cancelling*, "there must be such a marking, with intent to revoke, that it may be said that the instrument no longer exists as it was." In the present case, it would seem pretty palpable, that when the testator had written where he did, "this will is hereby cancelled and annulled in full this 15th day of March, 1857," the instrument no longer existed as it was.

Holding this to be sufficiently, in character, an act of *cancelling*, we proceed to remark, that the intent is so decisively manifested by it, as to give it full effect as an act of revocation. And we regard our brother Pierpoint as having most aptly expressed the true legal idea, when he said, in his charge to the jury, that "in the writing may be combined both an act and a declaration of intention."

Upon the face of the will, when produced, it was, in the eye of the law, cancelled; and the court would have been warranted in so ruling. This being so, the evidence that was received of the sayings of the testator, became immaterial, whether made at the time of the act of cancelling, or subsequently thereto. Hence it becomes unnecessary to decide whether the testimony, as to his sayings made subsequently to that act, would have been admissible as evidence of his intent in doing it, if it had been necessary for the defendant to show, *aliunde* the instrument, that the act was done with the intent to revoke the will by cancelling.

Some of the members of the court think the proponent had given occasion for the introduction of this evidence, by the character of the evidence which she had introduced in the opening of her case.

The only remaining question is, as to the republication claimed by

the proponent to have been made by sayings of the testator a few days before his death.

The will was revoked by the act of cancelling. The law of this State, in cases like the present, recognizes as valid such wills as are made in the mode prescribed by the Statute, which Statute prescribes the only modes in which they may be revoked. When thus revoked, it would seem quite incongruous that the instrument could be restored to its original vitality and force by mere words, without any further act done upon, or with reference to, such instrument.

In cases like the present, we have no wills at, or by force of common or ecclesiastical law, but only by Statute. The substance of the 5th section of the Statute of Frauds, 29 Car. II. c. 3, was enacted as early as 1787 in this State; and in 1821 the full force of that section, as also of the 6th section, was extended to personal as well as to real estate, and the same has been substantially the law of this State ever since. Slade's St. c. 44, §§ 17, 18; G. S. c. 49, §§ 6, 7.

The case before us does not bring in question the effect of executing a codicil with due formalities, after the act of revocation, or of another testamentary instrument, referring to, and designed to restore the revoked instrument; nor does it bring in question other acts done to or upon the instrument itself subsequently to the act of revocation; nor does it involve, or call for any discussion of the subject in the light of the cases decided in other States in which the English law as to wills has existed to a greater or less extent. We are therefore relieved from the complications and conflicts which the books show to have often troubled other courts; and for the additional reason that the evidence, upon which the point as to republication is predicated, could only bear upon the question of the intent of the testator in doing the act of revocation. The proponent had the full benefit of that evidence in that view, whether properly or not.

In the discussion and decision of this case, we have given no consideration to the act or words of the testator, in what he wrote upon the outside of the folded will under the fling.

The judgment is affirmed.¹

BIGELOW v. GILLOTT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1877.

[Reported 128 Mass. 102.]

APPEAL from a decree of the Probate Court for the County of Suffolk, allowing a certain instrument, with the exception of the "sixth" and "thirteenth" clauses thereof, as the last will and testament of Thomas Liversidge, deceased. The will of the testator contained the following clauses:—

¹ See *Evans's Appeal*, 58 Pa. 288 (1868); *Billington v. Jones*, 108 Tenn. 234 (1901).

"Sixth. I give to my executors the sum of six thousand pounds sterling, in trust, to be used and appropriated by them for the purpose of paying the debts which my father, Stephen Liversidge, owed in the year eighteen hundred and twenty-nine, said payment to be made to the legal representatives of the persons who were his creditors at the time: and it is my will and I hereby direct, that the principal only of said debts shall be paid, excluding interest; the sum of six thousand pounds being, in my opinion, sufficient for this purpose. If any portion of said six thousand pounds shall remain after payment of said debts, such remainder is to belong to the residue of my estate, and to be disposed of accordingly by said trustees."

"Thirteenth. I give and bequeath to John Shufeldt, of Marshfield in the county of Plymouth, the use and improvement of the estate and farm belonging to me in said Marshfield, during the term of his natural life, on the condition that said Shufeldt shall pay all taxes and cost of insurance appertaining to said estate, and shall continue to live thereon and occupy and cultivate the estate."

(The nineteenth clause gave his homestead estate to trustees to maintain a charitable institution.)

"Twentieth. I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed, to said Eleazer J. Bispham, Frederic A. Wellington and George Tyler Bigelow, absolutely and forever, in trust, nevertheless, to be appropriated, used and applied for the maintenance and support of the institution named and described in the last preceding clause of this will."

The appellants, the heirs-at-law of the testator, filed certain reasons of appeal, the following being the only one relied on in this court:—

"That, it having clearly appeared by the evidence before the Probate Court that the obliterations in said paper writing were made subsequently to the execution thereof, as the last will and testament of the alleged testator, and that no re-execution took place after said obliterations were made, the Probate Court, as it decreed the probate of the will, excepting the sixth and thirteenth clauses, should also have decreed that the portion of the estate originally disposed of under said sixth and thirteenth clauses, remained undisposed of by the testator at the time of his death, and passed to his heirs-at-law."

Hearing before *Colt, J.*, who found that the will was duly executed on or about the time of its date, in the manner required by law, by Thomas Liversidge, as and for his last will and testament, and that he was at the time of executing the same of full age and of sound mind; that in the will, as presented for probate, ink lines appeared, drawn probably with a pen, through and across each and every word constituting the clauses of the will, numbered respectively "sixth" and "thirteenth," leaving the words, however, legible; that the lines were drawn across the words by Liversidge in his lifetime, after the execution of the will by him as aforesaid; and, on all the evidence bearing upon the intention of the testator in making these erasures, and upon

the inspection of the original will, found, if competent so to find, that the erasures were made by the testator with the intention of revoking the sixth and thirteenth clauses of his will, but with no intention of revoking or defeating the other provisions of his will.

The question whether the evidence before him, (which was annexed to the report,) together with the original will, justified this finding, as well as the question, what effect those acts of the testator might have upon the will and the probate of it, were reserved for the consideration of the full court.

L. S. Dabney, for the executors.

H. A. Johnson, for the appellants.

MORTON, J. The presiding justice who heard this case has found as facts, that the testator erased the sixth and thirteenth clauses of his will after its execution, and that such erasures were made with the intention of revoking the said clauses, but with no intention of revoking or defeating the other provisions of the will. These findings were clearly justified by the evidence. We need not consider the evidence in detail, as the appellants do not contend that the findings were erroneous, the only questions raised by them being as to the legal effect of such erasures.

The Statute provides that "no will shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other will, codicil or writing, signed, attested and subscribed, in the manner provided for making a will." Gen. Sts. c. 92, § 11. This provision is a re-enactment of the Rev. Sts. c. 62, § 9, with merely unimportant verbal changes. The Rev. Sts. made material changes in the law as to wills, doing away with the distinctions between wills affecting real, and wills affecting personal, property, and putting all upon the same footing. The St. of 1783, c. 24, § 2, permitted the revocation of a devise of land, "or any clause thereof," in the manner pointed out in the Statute, which was the same manner now provided for the revocation of a will.

We see nothing to indicate that the Legislature, in the revision of 1836, intended to change the law in this respect and to limit the power of revocation to a revocation of the whole will. The power to revoke a will includes the power to revoke any part of it. If we were to hold that under this provision a testator could not revoke a part of a will by cancelling or obliterating it, we should be obliged by the same rule of construction to hold that he could not revoke a part by a codicil, which would be against the uniform practice in this Commonwealth, sanctioned by numerous decisions.

We are therefore of opinion that, in this case, the cancellation by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses.

The remaining question is as to the effect of this revocation upon the

property affected by the revoked clauses. The appellants contend that the property devised and bequeathed therein is to be treated as intestate property, which goes to the heirs-at-law or distributees; and the executors and trustees contend that it passes to them under the residuary clause of the will.

It is a clearly settled rule of law that, in a will of personal property, a general residuary bequest carries to the residuary legatee all the personal property of the testator which is not otherwise disposed of by the will, including all lapsed legacies and all void legacies. And in this Commonwealth, since the passage of the Rev. Sts. in 1836, the same rule applies to wills of real estate. *Thayer v. Wellington*, 9 Allen, 283, and cases cited. It is true that if a special bequest in a will lapses or fails for any reason, the sum bequeathed will not pass to the residuary legatee if it appears from the will that it was the intention of the testator to exclude it from the residuary clause. In *Thayer v. Wellington*, *ubi supra*, the court say: "We take the rule to be that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator, as found in other parts of the will. There must be a clear intention that in no event it shall pass to the residuary devisee."

In this case, there is nothing to indicate an intention on the part of the testator that the property covered by the revoked clauses should not go to the residuary devisees. The residuary clause is expressed in the broadest terms. "I give, bequeath and devise all the rest, residue and remainder of my estate of every description, of which I shall die seised and possessed." The intention of the testator is clear, to give all his property, not otherwise disposed of by the will, to the trustees named therein, for the support of the charity established by the nineteenth clause. He revoked the sixth and thirteenth clauses, and purposely and intelligently left the other provisions to stand as his will. The only fair inference is that he intended that the property covered by those clauses, and which by his revocation became undisposed of by the other clauses of the will, should fall within the residuary clause. We are of opinion that this case falls within the general rule, and that the property in question passes to the residuary devisees.

The argument of the appellants, that this view is in conflict with the provisions of law which require that a will disposing of property should be executed in the presence of three witnesses, is not sound. It is true that the act of revocation need not be done in the presence of witnesses; but such act does not dispose of the property. It is disposed of by the residuary clause, which is executed with all the formalities required in the execution of a testamentary disposition of property.

*Decree of Probate Court affirmed.*¹

¹ In *Pringle v. McPherson*, 2 Brev. 279 (So. Car. 1809), a testator devised to his daughter Elizabeth, besides other property, "three hundred acres, being part of his Newton tract of land." He devised to his daughters Nancy and Susan all his Pon Pon plantations, "except the three hundred acres before devised to Elizabeth." He gave the resi-

LADD'S WILL.

SUPREME COURT OF WISCONSIN. 1884.

[Reported 60 Wis. 187.]

APPEAL from the Circuit Court for Grant County.

The case is thus stated by *Mr. Justice Cassoday*:—

“It appears from the record and, in fact, is admitted by all parties and, in effect, found by the court, that the will of the testatrix was duly made, executed, attested, witnessed, published, and declared as a will. July 29, 1870, in the State of New York, but in strict conformity with our Statutes, and that the will is entitled to probate, if not revoked; that the paper upon which the will was written was a very large, thick, double sheet, the first page of which was originally a printed blank form of a will, the blanks of which were filled up with the writing; that the written and printed parts constituting the will were wholly upon the first page; that nothing was written or printed upon the second or third page of the sheet,—they being entirely blank; that the usual indorsement by the scrivener was upon the fourth or outside page of the wrapper leaf, and upon which there was also written in pencil, in the handwriting of the testatrix, the words: ‘*I revoke this will. Mary P. Ladd, October 7, 1879.*’

“October 7, 1882, the testatrix died, in Grant county, Wisconsin, where she then, and for several years had, had her residence and domicile. The testatrix retained the will until her death, when it was found in the bottom of her trunk, tied up with her decree of divorce, and covered with a newspaper. The Circuit Court, affirming the decision of the County Court, held that the will was revoked by the writing in pencil, and judgment was entered accordingly.”

From that judgment Arthur Sherman, the proponent and one of the residuary legatees under the will, appealed.

Wm. E. Carter and *A. R. Bushnell*, for the appellant.

J. T. Mills and *John G. Clark*, for the respondent.

CASSODAY, J. The frauds incident to allowing written wills to be set aside by parol testimony finally culminated more than two hundred years ago in the trial of the feigned issue in *Cole v. Mordaunt*, where it appeared at the bar of the King's Bench that most of the nine witnesses against the will were guilty of deliberate perjury, and that the due of his estate, real and personal, to his wife and children. He afterwards scratched out with pen and ink, but leaving distinctly legible, the whole of the clause devising the three hundred acres to Elizabeth, and also the words making the exception to Elizabeth in the devise of the Pon Pon plantation. The above facts were found by special verdict, and the jury prayed the advice of the court whether the obliteration was a revocation of the devise to Elizabeth, and if it was, whether the three hundred acres passed to Nancy and Susan under the devise to them, or whether they passed under the residuary clause, or whether they went as land undisposed of. The Constitutional Court of South Carolina held that the testator intended to increase the shares of his daughters Nancy and Susan, that his attempt to do so was ineffectual, and that the devise to Elizabeth stood as if the obliteration had not taken effect.

widow who sought to set aside the will was guilty of subornation of perjury. On a petition for a review of the case, Lord Chancellor Nottingham remarked that "he hoped to see one day a law that no written will should ever be revoked but by writing." See notes to *Mathews v. Warner*, 4 Ves. Jr. 196; *Prince v. Hazelton*, 20 Johns. 513. This remark and that trial led to the enactment of the Statute of 29 Chas. II., "for the prevention of frauds and perjuries," in the following year. 3 St. at Large, p. 385, ch. 3. In fact, the eminent father of equity himself introduced the bill, as he afterwards stated in *Ash v. Abdy*, 3 Swanst. 664; 4 Lives Ld. Ch. 271.

Section 6 of that chapter prescribed the manner in which a "devise in writing of lands, tenements, or hereditaments," or "any clause thereof," might be revoked, and prohibited revocation in any other manner. Our Statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise sec. 2290, R. S., is substantially the same as that of sec. 6. The Statute is imperative upon the court, and is to the effect that "no will, *nor any part thereof*, shall be revoked unless by (1) *burning*, (2) *tearing*, (3) *cancelling*, or (4) *obliterating* the same, *with the intention of revoking it*, by the testator, . . . or by some other (5) *will* or (6) *codicil in writing*, executed as prescribed in this chapter, or (7) by some other *writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will.*" Sec. 2290, R. S.

Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it. Each of the last three must not only be *in writing and signed*, but also *attested and subscribed in the presence of the testator by two or more competent witnesses*. Sec. 2282, R. S. It stands confessed that the writing in pencil was never attested or subscribed by any witness, much less by two witnesses in the presence of the testatrix. This failure to execute in the manner prescribed by the Statute manifestly prevented the words written in pencil from going into effect as a written revocation.

It should be observed that the written and printed matter constituting the will was wholly on the first page of the double sheet. The second and third pages were entirely blank. The pencil writing was upon the fourth page, — the outside of the wrapper leaf. Nevertheless, it is urged, in effect, that it was upon the same sheet of paper upon which the will was written, though remote from the writing, and hence that it should be held to have been done to the will itself; and that since the act so done consisted in writing *words* disclosing an *intent to revoke*, it must be held to be a "*cancellation*" of the will, "with the intention of revoking it," within the meaning of those words as used in the Statute. This, however, assumes that the second half-sheet of the paper, upon which no part of the will appears, constitutes

a part of the will. If this is so, then a sheet of paper may be never so large, and yet if a will be written upon one corner, and words indicating an intention to revoke be written upon another corner, however distant from every part of the first writing, yet it would have the effect to cancel the will. Would this be a fair construction of the Statute? Would such a construction prevent "frauds and perjuries," according to the original intention of those who enacted the Statute? Or would it be more in harmony with that intention to hold that the written and printed matter together, found on the first page of the double sheet of paper in question, constitutes the will of Mrs. Ladd? Of course, there could be no written or printed matter except upon some substance, and hence so much of the first half-sheet of paper as was essential to the existence and preservation of such written and printed matter, may, in a sense, be regarded as a part of the will. But no part of the double sheet of paper, much less any portion of the first half-sheet upon which the will was written and printed, was in the least burned or torn. Nothing was done to any portion of the written or printed matter constituting the will. No part of it was obliterated. No part of it was erased or cancelled. No interlineation was made. All that constituted the will remained intact. Every part of it remained as perfect as when it was first written. The same would have been true if the second half-sheet had been entirely severed from the first. The only question is, whether it was cancelled, within the intent of the Statute, by the mere force of the meaning of the word "revoke" contained in the pencil writing. As observed, the Statute requires, not only the act of cancelling the will itself, but that it must be done with the intention of revoking it. *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Doe v. Harris*, 6 Ad. & El. 209; *Francis v. Grover*, 5 Hare, 39; *Price v. Powell*, 3 Hurl. & N. 341; *Giles v. Warren*, 3 Eng. (Moak), 478; *White v. Casten*, 1 Jones Law, 197; *Means v. Moore*, Harper (S. C.), 314; *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. (Moak), 633; *Swinton v. Bailey*, L. R. 4 App. Cas. 70; s. c. 33 Eng. (Moak), 48; *Evans's Appeal*, 58 Pa. St. 238.

In *White v. Casten*, *supra*, the paper upon which the will was written was burned through in three places, one of them being in the midst of the writing, and a large part was scorched, but the writing was not interfered with, when it was rescued against the testator's wish, and preserved against his knowledge, and it was held to be a revocation. The mere act of burning, tearing, cancelling, or obliterating the will itself, without the intent, is not enough. *Burtenshaw v. Gilbert*, 1 Cowp. 52; *Francis v. Grover*, 5 Hare, 39; *Lock v. James*, 13 Law J. Exch. 186; *Elms v. Elms*, 4 Jur. (N. S.), 765; *Bigge v. Bigge*, 9 Jur. 192; *Clarke v. Scripps*, 16 Jur. 783; *Giles v. Warren*, 3 Eng. (Moak), 478. So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, cancelling, or obliterating, done to the will itself, is not enough. *Doe v. Harris*, 6 Ad. & El. 209; *Hise v. Fincher*, 10 Ired. Law, 139; *Mundy v. Mundy*, 15 N. J. Eq. 290;

Gains v. Gains, 2 A. K. Marsh. 190; *Runkle v. Gates*, 11 Ind. 95; *Perjue v. Perjue*, 4 Iowa, 520; *Heirs of Blanchard v. Heirs of Blanchard*, 32 Vt. 62; *Clingan v. Mitcheltree*, 31 Pa. St. 25.

Some courts have held that where the testator is deceived into the belief that he had done an act sufficient to revoke the will, it shall have that effect. *Pryor v. Coggin*, 17 Ga. 444; *Smiley v. Gambill*, 2 Head, 164. The case in Head was put on the ground that there was no such Statute in Tennessee, and the case in Georgia fails to refer to any Statute or decision. On the other hand, several of the above cases hold that where the legatee has falsely deceived the testator into the belief that he has in fact revoked his will, he shall be held in equity to hold the property as trustee for the heir; but that there can be no revocation except in one of the modes prescribed by Statute. But see *In re Wilson's Will*, 8 Wis. 171; *Allen v. McPherson*, 5 Beav. 469; s. c. 1 Phil. Ch. 133; s. c. 1 H. L. Cas. 191; *Gaines v. Chew*, 2 How. 619, 645; *Malin v. Malin*, 1 Wend. 625. The question, however, is not here involved, and is referred to merely because counsel seem to rely in part upon the Tennessee and Georgia cases.

Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator, yet, if the writing was never in fact attested and subscribed by the requisite number of witnesses, in the presence of the testator, so as to become effectual as a revocation under the Statute, it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the Statute. *Kirke v. Kirke*, 4 Russ. Ch. 441, 451; *Locke v. James*, 13 Law J. Exch. 186; s. c. 11 Mees. & W. 901; *Jackson v. Holloway*, 7 Johns. 394; *Hairston v. Hairston*, 30 Miss. 303; *Lewis v. Lewis*, 2 Watts & S. 455; *In re Penniman's Will*, 20 Minn. 245; *Laughton v. Atkins*, 1 Pick. 535; *Cheese v. Lovejoy*, L. R. 2 Prob. Div. 251; s. c. 21 Eng. (Moak), 633.

In *Kirke v. Kirke*, *supra*, the codicil was signed by the testator, who, among other things, in effect therein declared: "I do hereby revoke that part of my said will" which has been erased, and in lieu thereof substitute what has been interlined; but it was held, by an eminent judge in such matters, that, although there was a clear intent to alter the will as indicated, yet that, as the codicil had not been duly executed and attested so as to pass real estate, such intention was ineffectual, and the original will was held to be in force the same as though there had never been any alteration.

In *Locke v. James*, *supra*, the testator erased the word "six" wherever it occurred in his will, but leaving it still legible, and inserted over it the word "two," and thereupon added, presumably upon the same paper, the following memorandum or codicil to his will, *signed by him in the presence of one witness only*: "The alterations in the first and second sheet, all relating to the said annuities left to my daughter E. J. and her children, were made by me, the 15th of August, 1830. Witness my hand. R. N.;"—and Parke, B., speaking for the

court, said that the "rent-charge of £600 per annum, created by the will, duly executed and attested, . . . has not been cancelled, for the erasure was made *sine animo cancellandi*," and that it "has not been affected by the codicil, for the codicil is not duly attested, and therefore *cannot even be looked at*, so far as the real estate is concerned."

In *Jackson v. Holloway*, *supra*, the testator, after having erased certain words and interlined others in place of them, and "at the same time *indorsed on the will* an instrument" to the effect that he had made the alterations named, and thereby renewed the will, which instrument was duly signed, sealed, and published by the testator in the presence of *two* persons, who also signed the same as witnesses in his presence. But because there were not *three* instead of *two* witnesses, as required by the Statute of New York, it was held that the erasures, interlineations, and the written indorsement so executed and witnessed, had no effect whatever upon the original will.

In *Lewis v. Lewis*, *supra*, the word "obsolete" was written by the testator upon the margin of his will, but it was held to be of no significance.

In *Laughton v. Atkins*, *supra*, it was strongly intimated, if not held, that the written instrument containing words of revocation must itself be admitted to have that effect.

In *Cheese v. Lovejoy*, *supra*, the testator had drawn his pen through the lines of various parts of his will, and then wrote on the back of it, "All these are revoked," and threw it among waste papers; but it was preserved, and it was held that there was no revocation, because the words "or otherwise destroying," in the present English Statute, were not satisfied. But that Statute does not contain the words "cancelling or obliterating," like ours, and ours does not contain the word "destroying," like theirs; and hence the case is distinguishable. But in the more recent case of *Swinton v. Bailey*, *supra*, the will was made prior to the Statute of Victoria, and the case was decided under the old Statute like ours, and it was held by the House of Lords that the words "her heirs and assigns forever," through which the testator had drawn his pen, had been obliterated, within the meaning of that word as used in the Statute of Frauds.

Counsel for the respondent insist that the revocation here was complete within the rule followed in *Evans's Appeal*, 58 Pa. St. 238. In that case the will was executed May 24, 1856, and the last clause of it spoke of two erasures and interlineations in their places. At the same time, and immediately beneath the signature of the testator, was a codicil, also signed by the testator, making two changes in the will. Then followed the attesting clause and the signature of the witnesses. On or about July 21, 1858, the testator tore through three different clauses of the will, and made three erasures, one of which was so obliterated as to be illegible; and then made a second codicil, explaining such alterations and revocations. This second codicil was duly

signed and published by the testator, in the presence of the requisite witnesses, who subscribed the same. Subsequently the testator tore the first codicil in two places, erased his signature thereto, and also erased his signature to the second codicil, and wrote beneath it the word "cancelled." The will and codicils were all upon the same sheet of paper. This paper was indorsed "Will," which was erased, and the word "cancelled" written beneath it. Independent of the writing of the word "cancelled" there can be no doubt but what the tearing of the first codicil, which was executed at the same time and was in fact a part of the original will, and the erasure by the testator of his signature thereto, and also the erasure by him of his signature to the second codicil, was a complete revocation of the will. *In re Cooke*, 5 Notes Cas. 390; *Price v. Powell*, 3 Hurl. & N. 341; *In re Simpson*, 5 Jur. (N. S.), 1366; *In re James*, 7 Jur. (N. S.), 52; *In re Gullon*, 4 Jur. (N. S.), 196; *Avery v. Pixley*, 4 Mass. 460; *Mence v. Mence*, 18 Ves. Jr. 348. The case of *Woodfill v. Patton*, 76 Ind. 375, cited by counsel, was under a different Statute, and hence is not applicable. The same is true of the recent case of *Lovell v. Quitman*, 88 N. Y. 377. See *Gay v. Gay*, 60 Iowa, 415, which was also under a different Statute.

The learned judge writing the opinion in *Evans's Appeal* was clearly right in saying: "But to enable the will, codicil, or other writing to have such an effect [revocation], it must itself be complete, executed, and proved in the prescribed manner, namely, as a will. The other mode of repeal is something done to the will itself, something more than mere intention expressed. It must be intention to annul carried into execution by acts done to the paper. . . . Were there nothing more than the erasure of the last signature to the writing dated May 24, 1856, it would be difficult to escape from the conviction that it was an act of repeal annulling all that preceded that signature." In view of the additional facts which appeared, that the testator also tore the first codicil in two places and erased his signature from the second codicil, it would be impossible to come to any other conclusion than that he intended, by the acts named, to revoke both of the codicils and the whole will. These several acts being made with the intent to revoke, as there found, clearly amounted to a cancellation of the will; but when the learned judge went further, and construed the word "cancelled," written thereon, and said, "*I think* a repeal [a revocation of the will] is effected by the act of writing upon the will itself a word that manifests an intention to annul it," he was evidently speaking for *himself*, and not for the court, and as it would seem in direct violation of the rule he had just expressed himself, to the effect that there could be no revocation by mere "writing," unless it "be complete, executed, and proved in the prescribed manner, namely, as a will." Besides, such a rule would be in conflict with a previous decision in the same court. *Lewis v. Lewis*, *supra*. True, the learned judge attempts to distinguish that case by observing "that though the word was written upon the paper on which the will was written, it was placed where it could

have been detached without defacing the instrument. It might have been separated and the will itself remained intact. In this respect it differed from the case now before us." That distinguishing element, even if it were sound, would distinguish *Evans's Appeal* from the case before us, and make *Lewis v. Lewis* applicable. The learned judge who wrote that opinion was evidently led to say what he did by what was said by the judge writing the opinion in *Warner v. Warner's Estate*, 37 Vt. 356, where the testator wrote on the back of the very paper on which a part of the will was written, and on the second page, and just below some of the writing, so that it could not be separated from it, the words "This will is hereby cancelled and annulled in full, this 15th day of March, in the year 1859." Other words were written on the fourth page, and some erased, but the court held, in effect, that the will was cancelled by force of the above words. If that ruling were sound, the facts would distinguish the case from this; but giving the force of revocation to the words themselves, without being executed, attested, and subscribed as required by the Statute and without any tearing or burning of the paper upon which any part of the will was written, and without erasing, defacing, or obliterating any of the words of the will, or the signature of the testator or the signature of the witnesses, would seem to leave the case standing alone, with nothing to support it, and in opposition to the principles maintained in some of the best adjudicated cases. Besides, the case is condemned by one of our ablest text writers on the subject. 1 Redf. on Wills (4th ed.), 318. The difficulty with the rule contended for is that it gives to the words written in pencil, although not attested, witnessed, nor executed in the manner prescribed by the Statute, the same force as though they had been so attested, witnessed, and executed, for the purpose of proving that the act of putting the words there was with the "intention" of revoking the will. It is the language—the expression by written words alone—which is thus sought to be made effectual; whereas the Statute in effect declares that such written words shall have no force or effect as such unless executed, attested, and subscribed as required.

The argument used by the writer of the opinion in *Evans's Appeal*, *supra*, and here repeated, to the effect that the word "cancelling" in the Statute is used in the same sense as cancelling notes, bonds, or other written instruments, is plausible, but fallacious. It is the payment, adjustment, settlement, or decree of the court which precedes the writing of the word "cancel" upon the instrument, that effects the cancellation. The word is written in such case merely as a memorandum or evidence of the previous facts which operate as a nullification. Besides, such writing is generally upon the face of the instrument itself, and not upon some remote corner of the same sheet. A will, unlike other written instruments, does not go into effect until the testator's death. The mode of making a will is definitely prescribed by Statute, and the mode of revoking wills is also definitely prescribed; and no essential part of the latter can be dispensed with any more than the former. So, a specific mode of cancellation of tax certificates, &c.,

fixed by Statute, furnishes no ground for holding that a will, though not included in such Statutes, may also be cancelled in the same way. Our Statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts. In so taking it, the people of the State knew what they had obtained. To change that construction by some artificial mode of reasoning is to open the door to vagueness and uncertainty, the disastrous effects of which no one can in advance determine.

But it is claimed that such intention to revoke is sufficiently proved, without resorting to the words in pencil, by the declarations of the testatrix. It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross-examination. *Jackson v. Kniffen*, 2 Johns. 31; *Waterman v. Whitney*, 11 N. Y. 157; *Staines v. Stewart*, 8 Jur. (N. S.), 440; *Boylan v. Meeker*, 28 N. J. Law, 274; *Hargroves v. Redd*, 43 Ga. 142; *Runkle v. Gates*, 11 Ind. 95. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in *Southworth v. Adams*, 11 Biss. 256. It has been held that where the intention to revoke had existed and been partly carried into execution, and the testator changed his mind and arrested the act of burning, tearing, cancelling, or obliterating the will before its completion, leaving the will so that its contents could still be read, that it might nevertheless be admitted to probate. *Doe v. Perkes*, 3 Barn. & Ald. 489; *Doe v. Harris*, 6 Ad. & El. 209; *Giles v. Warren*, 3 Eng. (Moak), 478.

So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed, the will remained intact as before. *Short v. Smith*, 4 East, 418; *Kirke v. Kirke*, 4 Russ. Ch. 435; *Martins v. Gardiner*, 8 Sim. 73; *Locke v. James*, 13 L. J. Exch. 186; *Jackson v. Holloway*, 7 Johns. 394; *McPherson v. Clark*, 3 Bradf. Surr. 92; *Wolf v. Bollinger*, 62 Ill. 368; *Wright v. Wright*, 5 Ind. 389; *In re Penniman's Will*, 20 Minn. 245; *Quinn v. Quinn*, 1 Thomp. & C. 437; *Wheeler v. Bent*, 7 Pick. 61.

But without further discussion, which is already too extended, the judgment of the Circuit Court is reversed, and the cause is remanded with direction to reverse the judgment of the County Court and to direct judgment admitting the will to probate.

By THE COURT.

Ordered accordingly.

MILES'S APPEAL.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1896.

[Reported 68 Conn. 287.]

APPEAL from an order and decree of the Court of Probate for the District of Milford, refusing to admit to probate a certain clause in the will of Diana M. Miles, taken to the Superior Court in New Haven County and tried to the court, *Hall, J.*; facts found and judgment rendered in favor of the appellants, and appeal by the original appellees for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William B. Stoddard and *James H. Webb*, for the appellants (original appellees).

Talcott H. Russell, for the appellees (original appellants).

FENN, J. DIANNA M. Miles, late of Milford in this State, died in 1891, being then about eighty-six years of age. She left a will dated and executed February 13th, 1879. This will, in addition to the formal parts and the clause appointing an executor, contained two sections only, which are as follows:—

“*First.* After all my lawful debts are paid and discharged I give, devise, and bequeath to my nieces, Susan Whittlesey and Isabel Newton, daughters of my brother Charles, to each of them ten shares of the capital stock of The New York, New Haven & Hartford Railroad Company, being in all twenty shares of said capital stock, of the par value of one hundred dollars each, to them, their heirs and assigns forever.”

“*Second.* I give, devise, and bequeath all the residue and remainder of my property and estate, both real and personal, of whatever kind and nature, to my brothers, Charles, David, and Henry Carrington Miles, share and share alike, to them, their heirs and assigns forever.”

When this will was presented in the Court of Probate lines appeared drawn through all that part of the above recited first section, after the words, “*First.* After all my lawful debts are paid and discharged I”; that is to say, commencing with the word “give,” and ending with the word “forever.” The words over which said lines were drawn were in no other manner canceled or obliterated, but remained perfectly legible.

The case came to the Superior Court on an appeal from an order and decree of the Court of Probate for the district of Milford, denying the application of the then appellants, that the words and clauses above referred to, through which lines were drawn, be admitted to probate, and in disapproving and disallowing said words and clauses, and in proving, approving, allowing and admitting to probate said will without said words and clauses. The Superior Court rendered judgment reversing the decree of the Court of Probate. From this judgment the original appellees appealed to this court. They thus in turn became appellants, and will be so regarded and styled in this opinion. The original appellants will be called the appellees.

Upon the trial in the Superior Court no exceptions to rulings upon evidence, or to anything which occurred during the presentation of the case, were taken. The court made a finding of the facts upon which its judgment was based, and the sole questions of law relate to the sufficiency of said finding to support and vindicate such judgment. The claims made by the appellants are stated in the finding, and were: that the facts found were sufficient in law to establish the fact that either the testatrix herself made said erasures, or caused the same to be made in her presence, and that upon said facts found, the erasures in question constituted a valid revocation of said bequest in said will; that the legal presumption was that said erasures were made by the testatrix, and that the burden of proof was upon the appellants to show that said erasures were not made by her, or by some person in her presence by her direction. The appellees claimed otherwise, and further, that a portion of a will could not in this manner be revoked under the statute of this State.

The statute referred to, in force at the time the will in question was made, is now part of General Statutes, § 542. It provides: "No will or codicil shall be revoked in any other manner except by burning, canceling, tearing, or obliterating it by the testator or by some person in his presence by his direction or by a later will or codicil." There must of course in any given case be a will, otherwise valid and operative, before the question as to how it may be revoked will arise. There was one here, but lines had been drawn through a certain portion of it after execution, and before exhibition in the Court of Probate. The sole inquiry was, did this fact operate as a revocation, not indeed of the entire will, but of that portion of it. It could not so operate unless the requirements of the statute had been complied with. Waiving for the time the question whether such cancellation, however effected, would constitute such partial revocation, it remains that in order to do it the act must be done by the testator, or by some person in his presence by his direction. Unless this be found, no finding that would justify a revocation exists. The court has made no such finding in this case. On the contrary the judge said: "I do not find that said erasures were made by the testatrix or in her presence."

But the appellants urge that the court did find certain evidential facts, and that upon these facts the legal presumption was that the cancellation was made by the testatrix *animo revocandi*, and that the burden of proving the contrary was upon the appellees. A word in explanation of this claim, as the appellants make it, may be called for. They do not assert that in every case, and at the outset, a burden rests upon the proponents of a will to prove not only the affirmative, that it was once valid, but also the negative, that it has not been afterwards revoked, either wholly or in part; to prove the case and anticipate and disprove the defense. This being so, they do not mean that a burden of proof is upon the appellants "in the first instance" — *Knox's Appeal*, 26 Conn. 20, 22 — but only a burden "shifted," if such expression is ever proper, and it is sometimes used. *Burber's Appeal*, 68 Conn.

393, 403. The main facts upon which the appellants rely in support of this claim of a legal presumption in their favor, are these:—

“The will in question was drawn by Charles Miles, the executor, in 1879, at the time it bears date, and remained in his possession unchanged until the fall of 1885, when David Miles, a brother of the testatrix, and one of the residuary legatees, sent for the will, and in pursuance of his request Charles Miles sent said will to said David. Shortly after the will was so sent by Charles Miles to David Miles, the testatrix handed to David Miles an envelope upon the outside of which was written, ‘Diana Miles’ will,’ and said to him, ‘There is my will.’ As she handed the will to David he said to her, ‘Are you satisfied with it now?’ and she replied, ‘Yes.’ It did not further appear in evidence how or when or for what purpose, the testatrix had received said will from David Miles after he had received it from Charles Miles, as aforesaid. From that time the will remained in the possession of said David Miles, until his death in December, 1885. A few days after the death of David Miles, at the request of the testatrix, the will was delivered to Henry C. Miles, a brother of the testatrix, who from that time kept it in his possession until it was filed in the Court of Probate by said Henry C. Miles, in February, 1892. The erasures in question were made prior to delivery of the will to Henry C. Miles, after the death of David, aforesaid.” They were not made prior to the time the will was sent by Charles Miles to David Miles, in 1885. “In the fall of 1881 said Henry C. Miles, who had procured a copy of said will, said to the testatrix, ‘By your will you have given my brother Charles’ family twenty-four shares of the New York and New Haven Railroad stock, and you have given brother David and myself eight.’ The testatrix replied, ‘I won’t have it so: I will scratch it out.’” The court reciting these facts added: “From the appearance of said erasures and from all the facts aforesaid, I believe that said erasures, though made at the request of the testatrix, and for the purpose of revoking the provision of the will over which said lines were drawn, were not made by the testatrix herself.”

We discover nothing in these facts which raises what may be called a *legal* presumption in favor of the appellants, if by that term was meant anything more than that such facts, or some of them, have a recognized and declared probative weight, sufficient under some circumstances to establish a *prima facie* case. Concerning such presumptions, so called, there is in the books an infinite variety and contrariety of statement. But it is useless here to enter into a discussion of the matter, for upon the record before us we can see no reason to think the trial court failed to give to each item of evidence its full weight, whether naturally pertaining or arbitrarily attached to it by the law. It was the duty of the court to weigh all the evidence, and we cannot say that it did not do so, and correctly. In other words, if the appellants meant by their claim that facts found were sufficient as a matter of law to establish conclusively, irrefutably, the fact that the testatrix either herself made such erasures, or caused the same to be made in her presence,

such claim is not correct, and no authority has been cited or exists anywhere to support such claim. But if it is only meant that such facts shift, satisfy or discharge a burden, casting it upon the other side, not to prove the contrary, but to disprove or overcome that, not to establish a negative, but to overcome an affirmative, we cannot say, nor do we believe, that the court below considered or acted otherwise than with the same view.

It was further claimed by the appellees, as we have seen, that a portion of a will could not be revoked in the manner considered. If this be correct, it in itself furnishes a full justification of the decision of the court below. For the reasons already stated, we do not need to place our decision upon this ground; yet we ought not to pass it by without some reference and consideration. It would perhaps be too strict a construction of the statute referred to, if we held that under no circumstances could there exist a partial revocation of a will or codicil, effected by burning, canceling, tearing or obliteration; that such revocation must extend to the whole instrument and be operative to revoke the whole, or be without effect. Such a construction has indeed been given to very similar statutory provisions in several other jurisdictions. But probably the weight of authority upon the question is otherwise. The entire subject is most exhaustively and ably treated in a note to the case of *Graham v. Birch*, 28 Amer. St. Rep. 344. But on the other hand if we were to declare, following the language of the opinion often cited in *Bigelow v. Gillott*, 123 Mass. 102, that the authority to revoke an entire will included the lesser power to revoke any portion of it only, and to stop there, as the court in Massachusetts does, it seems to us that an inference might be drawn that would extend entirely too far. For, if such conclusion, looking at the statute in question alone, might be drawn, there is another statute appearing upon the same page of the General Statutes, namely § 538, providing how wills must be executed. If a case arises which is simply and purely one of revocation, § 538 will not apply. But if such revocation involves alteration, it certainly must apply. The difference in meaning between the two terms is aptly stated by MELLISH, L. J., in *Swinton v. Bailey*, 45 L. J. Ex. 427, where a testator by his will had devised his real estate to E, "her heirs and assigns forever." He subsequently obliterated these words with pen and ink. The judge said (p. 429): "The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration." In *Eschbach v. Collins*, 61 Md. 478, is an able discussion of this matter. In that case the effect of erasures was to enlarge the estates of the devisees from life estates to fees. The court held such erasures inoperative under a statute which provided that a will, or any clause thereof, might be revoked by cancellation. The court said (p. 499): "The will has not been revoked; it has been altered. It cannot be supposed that when the legislature uses the word

'revocation,' it is to be construed to mean 'mutation.' . . . When by the obliteration of certain words a different meaning is imparted there is not a mere revocation. There is something more than the destruction of that which has been antecedently done. There is a transmutation by which a new clause is created. There is another and a distinct testamentary disposition which must be authenticated by the observance of the statutory requirements." The court gives as an illustration of how fully such a transmutation might be made by mere erasures, this example: Suppose the original words were, "To my son William I give nothing, and give all my estate to my son John." The will with no addition could be made to read, "To my son William I give all my estate." This may seem an extreme illustration, but probably there are few wills made, of any considerable length, in which alterations in meaning, by mere erasure, could not be effected, as objectionable, if not as marked as this. Indeed, without holding that there are none, it seems to us that there are few cases that could arise where the revocation of a portion only of a will, would not operate to alter other portions of it. If an entire clause — meaning by that word one of those distinct and generally numbered subdivisions into which wills are frequently apated, or an entire unconnected provision making disposition of property — be erased or canceled, and what was thus disposed of becomes intestate, it may be said that there is a revocation, and nothing more.

The same thing has been affirmed by some courts where, instead of such intestacy, the property passes into a prescribed residuum. But this appears to us to be more questionable. The residuary devisee or legatee takes by virtue of the will, defeating the heir, and he takes by force of the alteration what he did not take without it. The mischief seems the same. The distinction is more apparent than the difference. Take the very case before us: There were originally two clauses. One disposed of certain stock; the other of the balance of the estate. By revoking the first, there ceased to be any residue, unless the estate in its entirety can be so styled. But look at the object of the change. Was it revocation, or was it alteration? One of the brothers of the testatrix procured a copy of the will from another brother who had it in his possession. He was apparently curious until he knew its contents, and dissatisfied when he learned them. He said to his sister, "By your will you have given my brother Charles' family twenty-four shares of the New York and New Haven Railroad stock, and you have given my brother David and myself eight." She said "I won't have it so; I will scratch it out." What was this interested brother's motive? To defeat his nieces of their legacies? Or was it rather to increase his own? What would the old lady "not have so"? That her nieces should be remembered, or that the families of those brothers should be treated unequally? It seems to us the answer is obvious, and that to all just intents and purposes here was not merely revocation, but substitution; not destruction, but reconstruction; a "scratching out" indeed, but one equivalent to a writing in; the making of a new testamentary disposition, and in a manner not permitted by law — a law

passed in the interest of public policy, the wisdom of which such a case as the present abundantly demonstrates.

There is no error.

In this opinion the other judges concurred.¹

NOTE.— On the presumption of intention to revoke when one of two duplicate wills has been destroyed and the other not, and on the presumption that a will not found has been destroyed by the testator; also on the question whether a cancellation is to be presumed as final or only deliberative, *e. g.* when made with a pencil, — see 1 Jarm. Wills (5th ed.) 123-125; *Francis v. Grover*, 5 Hare, 89 (1845); *Matter of Kennedy*, 167 N. Y. 163 (1901).

On the meaning of a statute authorizing revocation by "mutilation," see *Woodfill v. Patton*, 76 Ind. 575 (1881).

In *Riggs v. Palmer*, 115 N. Y. 506 (1889), A made a will containing provisions for B, his grandson. B knew of the provisions of the will in his favor, and, to prevent revocation of the will and to obtain immediate possession of A's property, he murdered A. The will of A was admitted to probate. B was convicted of the murder. An action was brought to have the will of A so far as it gave property to B cancelled and annulled. Judgment was given, declaring the devise and bequest to B "ineffective to pass the title" to him, and that B was deprived by reason of his crime of any interest in A's property, whether under the will, or as one of his heirs and next of kin. But see *Ellerson v. Westcott*, 148 N. Y. 149 (1898), and an article by Professor Ames, 36 Am. Law Reg. N. S. 225 (1897).

C. *Dependent relative Revocation.*

ONIONS v. TYRER.

CHANCERY. 1717.

[*Reported 2 Vern. 742.*]

MR. TYRER, in 1707, made a will, duly attested by *three* subscribing witnesses, and thereby had disposed of his real estate, and being afterwards minded to make some alteration in his will, in the year 1711 he made a second will touching his real estate, and with a clause in it of revoking all former wills; but there being no table in the room where the testator lay sick and subscribed his will, the *three* subscribing witnesses did not attest it in his presence, but went into a lower room out of the testator's sight, and there wrote their names as witnesses to the publishing this latter will; and it was also in proof in the cause that there being two parts of his former will, one whereof was in his custody, he called for that which was in his own custody, and directed his wife to cancel it, and the witness swore she heard her tear it; and the question now was, whether the former will was well revoked, or not.

First. It was resolved, that although there was an express clause in the latter will of revoking all former wills; yet *that* latter will being void, the witnesses not attesting the same in the testator's presence, *that* would not amount to a revocation, it being intended to operate as

¹ See *Eschbach v. Collins*, 61 Md. 478 (1884); *Richardson v. Baird*, 126 Iowa, 408 (1906).

Under the New York Statute obliteration of a part of a will is not effective. *Lovell v. Quitman*, 88 N. Y. 377 (1882).

a will, and not otherwise as an instrument of revocation : and so it was adjudged in the case of *Eggleston and Speak*, 3 Mod. 258 ; Sir Bart. Shore's Reports, 89 ; and in the case of *Hilton and King*, 3 Lev. 86.

Secondly, where there were duplicates, and two parts of the former will, in case the testator duly cancelled and tore *that* part, which was in his own custody or keeping, that would be an effectual cancelling of the will, although the other part or duplicate remained whole and uncanceled ; and it was so resolved in *Sir Edward Seymour's Case*.

Thirdly. LORD CHANCELLOR [LORD COWPER] was of opinion, that the former will stood good ; for the latter will being void, and not operating as a will, would not amount to a revocation ; and as to the actual cancelling of the former will, the evidence was not full and positive, that it was done ; the witness thought she heard the wife tear it. It is plain he did it only upon a supposition that he had made a latter will at the same time, and both wills as to the main, were much to the same effect, and with little variation as to the disposition of the real estate ; and he did not cancel it with a design to revoke the devises as to the real estate, but intended to do the same thing by a latter will ; and in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident, and decreed it accordingly.¹

ATTORNEY-GENERAL v. LLOYD.

CHANCERY. 1747.

[Reported 1 Ves. Sr. 32.]

JOHN MILLINGTON, seised of a considerable real and personal estate, made a will in 1734, and gave his real and personal estate to be laid out in purchase of real estate, to his executors and other trustees and their heirs, to apply the rents and profits to payment of some legacies ; then to reimburse themselves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and personal estate to certain uses ; and that being doubtful, whether by the late Mortmain Act his devise of his real estate to the charity or part thereof would be good, and being desirous to confirm it in that case, and not otherwise, he gives so much of his real and personal estate, as could not pass by his will, to the use of his nephew, Millington Buckley, at his age of twenty-one, with limitations over, on his dying without issue, with proper maintenance till that age. He afterward makes *another codicil, reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof*, he gave his per-

¹ See *Scott v. Scott*, 1 Sw. & Tr. 258 (1859) ; *Dancer v. Crabb*, L. R. 3 P. & D. 96 (1873). Cf. *Giles v. Warren*, L. R. 2 P. & D. 401 (1872).

sonal estate to his executors upon trust, that if it cannot be laid out in land, it may in securities for the same charity; and his real estate he gives unto and for the use of Millington Buckley, at twenty-one; and declares, that it is his opinion, that his estate at L. is sufficient to maintain him during his minority. Upon an information to have the will and codicils so established, as that the charity might be carried into execution; it was decreed at the Rolls that the will was well proved, and that the trusts should be performed, and that a scheme should be proposed for carrying the charity into execution: from which decree the defendant, Millington Buckley, brought the present appeal.

LORD CHANCELLOR. [LORD HARDWICKE.] I am very doubtful about this case, and would put it in a proper way of being determined. This is very different from all the cases cited. The question of revocation does not turn upon collateral circumstances, but merely on the words in the instruments themselves; which make it differ from *Onions v. Tyrer*; indeed, Lord Cowper there says, it might be relieved on the head of accident; but I do not know how he could come at it in a question between devisee and heir-at-law. It is proper, therefore, for a court of law; and the same construction must be made as there. The first reason why I doubt, is, that if the testator had intended, as the relators contend, that this was a revocation, and a new devise only in case the will was not good, he would have left it on the first codicil: and no occasion for making a new one; for it would be just the same with respect to the charity as on the first. Another reason, which makes me doubt, is, that it is very nice to say, that because the reason a person gives fails, therefore his devise should fail. I do not know how far that will extend; the testator has put it on the advice he received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law: he might do it in order to quiet the doubtful question; but I do not say he did so. The third and principal reason is, I doubt, whether this disposition is put singly on the point of law: for considering the material words *being advised*, and the subsequent words, who can tell what he meant there? The codicil was made two years after, and his personal estate might be so increased as to be a sufficient fund for the charity; for all this together might be his reason, and it is impossible to say he depended on one more than another. I give no opinion, for it is a mere point of law, and a new case; and will send it in to B. R., to be there solemnly argued, and reserve further considerations till after the judge's certificate.¹

¹ The question was, "Whether the testator's real estate in S. and S. were well devised by the second codicil, dated the 17th of March, 1786, to the defendant M. B. for life, with remainder over to his first and other sons in tail-male, the said M. B. having attained his age of 21 years," &c. The court certified in the affirmative, whereupon Lord Hardwicke declared and decreed accordingly.

CAMPBELL v. FRENCH.

CHANCERY. 1797.

[Reported 3 Ves. Jr. 321.]

THE will of the testator, dated London, 23d of August, 1790, and disposing of personal estate only, contained the following clause :

“ As I understand, that my late sister Margaret Bell has two grandchildren living in Northumberland County, Virginia, within three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a granddaughter, I give to each of them £500.”

A codicil, dated the 5th of January, 1791, contained the following clause :

“ And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell’s grandchildren, I hereby revoke such legacies and bequests ; they being all dead.”

The fact of the death of the legatees was not true. Pinkston Campbell married William Atkins in America. The bill was filed for an account and payment of these legacies.

Evidence proving the identity of the plaintiffs was read.¹

Mr. Lloyd and *Mr. Harvey*, for the trustees, defendants.

LORD CHANCELLOR. [LORD LOUGHBOROUGH.] It appears to me there is no revocation, the cause being false ; whether by misinformation or mistake is perfectly indifferent. . . . Declare the legacies not revoked, the parties being alive.²

GOODS OF APPLEBEE.

PREROGATIVE COURT OF CANTERBURY. 1828.

[Reported 1 Hagg. Ecc. 143.]

WILLIAM APPLEBEE died on the 7th of November, 1827, leaving behind him Mary Ann Arnald, widow, his natural and lawful sister, and only next of kin ; and Sarah (wife of Charles Bassage), his lawful niece — the only persons entitled in distribution in case he had died intestate. The deceased duly executed his will on the 14th of April, 1823. In 1825, he delivered this will (the exhibit A) to Mr. Jackson, the sole executor, and requested him to make certain alterations in it. Mr. Jackson drew his pencil through the signature at the bottom of the will, and made some alterations with the same material : the deceased expressed his approbation of them, and said, that he would make a copy, and execute the same in the presence of witnesses.

¹ Only that part of the case which relates to the question of revocation is given. See also *Newton v. Newton*, 12 Ir. Ch. 118 (1861), *post*.

² See, *accord*, *Doe d. Evans v. Evans*, 10 A. & E. 228 (1839).

On the 29th of September, 1827, the deceased mentioned to his solicitor, that he had made his will in his own handwriting, and promised to show it to him; and on the first of November, he told an intimate friend — whose opinion he had asked respecting the papers marked B — that he would write his will again; and, on the evening of the same day, the deceased mentioned to his sister that he proposed to recopy his will. On the 6th, the deceased brought the papers (B) from his bedroom into the parlor, and said to his sister, "That he had intended to reduce them to a smaller compass, but found himself too weak to do so; and added, that if he did not get better, he would have his will written for him on the morrow." On the following day, the deceased died: "B" was found in a closet of his bedroom; and "A" was found (with the signature of the deceased, and the names of the witnesses struck through), in a box with leases, and documents of importance.

These circumstances were fully substantiated by affidavit, and Mrs. Arnald and Mrs. Bassage and her husband had executed a proxy, consenting "to probate of the said will of the deceased, bearing date the 14th of April, 1823, or letters of administration with the said will, or the said testamentary memoranda annexed, of all and singular the goods, chattels, and credits of the deceased, being granted in such manner and form, and to such person, as the court may direct."

Lushington moved for a decree.

PER CURIAM. The paper B is, in substance, the same as the will of 1823, marked with the letter A; but it also contains a great deal of matter extraneous, and not of testamentary import. There can be no advantage in annexing it to the will. The signature of "A," being struck through, is to be regarded as preparatory to the deceased making a new will — which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation. The court, therefore, as the consent of all parties interested has been given, thinks it would best consult the intentions of the deceased, by decreeing probate of "A" singly, as it originally stood before the signature was touched.

Motion granted.

GOODS OF MORESBY.

PREROGATIVE COURT OF CANTERBURY. 1828.

[*Reported 1 Hagg. Ecc. 378.*]

THIS was an application from the widow of Lieutenant Moresby, R. N., that probate of his will, dated on the 25th of January, 1821, might be granted to her as sole executrix; and in support of her application she made the following affidavit: —

"That she was the relict of the deceased, sole executrix, and universal legatee for life named in his will, duly executed and dated the

26th of January, 1821; that shortly after this period the deceased left England, in the command of a private merchant vessel, taking with him this will, and proceeded with his wife to Peru; that after their arrival, they resided principally on board; but that during a temporary absence of Lieutenant Moresby, the vessel with all his effects and papers, including his will, was captured by pirates, but was soon afterwards retaken: that on the occasion of such capture, the deceased lost several papers of consequence, and expressed his firm belief to his wife that his will had then been destroyed. That the deceased, as she has been informed, and verily believes, whilst at the city of Bolivar, was attacked with the illness of which he died; that on the 13th day of February, 1827, the day before his death, being incapable of writing, and fearing he might die intestate, he sent for a notary, in whose presence, and that of four other witnesses, he made a nuncupative will by declaring, that in contemplation of his death, he nominated and appointed two executors — both resident in the city of Bolivar — and his wife sole heiress, and revoked all his other testamentary dispositions; but that the said will was not reduced into writing in the lifetime of the deceased." Mrs. Moresby further made oath, "that, upon the renunciation of the two executors in the proper court at Lima, she there duly proved the nuncupative will, and administered the effects in Peru; and that shortly before the deceased's death, and, as she verily believes, while he was at Bolivar in his last illness, she discovered among his papers on board, the will, dated 26th January, 1821, but that he died in ignorance of that circumstance." The affidavit further stated, that both the executors were resident in the city of Bolivar, or some other part of Peru, of which one was a native.

The only property of the deceased in this country consisted of about £500 due for arrears of half pay.

Lushington. The question is, whether a nuncupative will made and proved in Peru supersedes a prior will written and executed in this country — whether the Statute of Frauds (29 Car. II. c. 3, § 22) does or does not affect such a case. The widow, in asking probate of the will of 1821, waives an interest which she would take under the will of 1827 — in the former, she has but a life interest — in the latter, she is absolute universal legatee.

PER CURIAM. It is not necessary here to decide the question (upon which there may be some doubt), whether the Statute of Frauds would apply to the nuncupative will made in Peru. Both wills contain nearly the same disposition, and give the whole property to the wife; the latter absolutely: the former, of which she is content to take probate, for life only. It appears that the deceased did not intend to revoke the will of 1821, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been recovered, there is no objection to probate thereof being granted to the widow and universal legatee for life.

Motion granted.

LOCKE v. JAMES.

EXCHEQUER. 1843.

[Reported 11 M. & W. 901.]

PARKE, B.¹ The material facts in this case were as follows.

Ralph Nicholson, by his will, duly signed and published in the presence of and attested by three witnesses, devised certain real estates in Essex to his son Ralph Nicholson in fee, charged with the payment of an annuity of six hundred pounds to his daughter Elizabeth James, the defendant, for her life, with the usual powers of distress and entry; and after various other devises and bequests, he gave all the residue of his estate, after payment of his debts, and the legacies and annuities thereinbefore bequeathed, and the duty payable thereon, to his said son, his heirs, executors, and administrators. On the 15th of August, 1830, the testator with his pen erased the word "six," in the gift of the annuity, and wrote over it the word "two," leaving, however, the word "six" still legible; and on the same day, he signed a codicil in the presence of and attested by one witness only, mentioning that he had on that day made the above-mentioned alteration.

The testator died in December, 1831, and his will and codicil, with other codicils not material to be now considered, were duly proved soon after his decease, and the executors possessed themselves of his personal estate, which was more than sufficient to satisfy his debts and legacies, including the annuities.

The plaintiffs are the parties entitled to the real estate under Ralph Nicholson, the devisee, and they have brought the present action, which is an action of trespass for seizing their goods under a distress. The question is, whether the defendant is entitled under the will and codicil to an annuity of £600 *per annum*, or to an annuity of £200 *per annum* only. If she is entitled to £600 *per annum*, then it is admitted that the distress was lawful, and that this action cannot be maintained.

It was not, and indeed could not have been, disputed, but that if the annuity had been charged on the real estate only, then neither the erasure nor the codicil would have affected it. The erasure would have had no effect, because the testator did not mean to destroy the annuity of £600 *per annum* in any other way than by substituting for it an annuity of £200 *per annum*. The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication; and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an

¹ Only the opinion is given.

act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. The codicil or memorandum, being unattested, clearly could have no effect on the disposition of the real estate.

But on the part of the plaintiffs, it is argued, that, taking such to be the law where the gift relates to real estate only, yet here the case is different, for that, looking to the whole will, the personal estate would be the primary fund for payment of the annuity, the real estate being liable only in case the personal estate should be deficient. And then it was said, the erasure and codicil together would certainly have the effect of reducing the annuity, so far as it was payable out of the personal estate, and so, by necessary consequence, must affect the real estate, which is merely charged by way of security, in case the personal estate should be insufficient. And in support of this proposition the plaintiffs relied mainly on the case of *Brudenell v. Boughton* [2 Atk. 268], before Lord Hardwicke. The defendant's counsel, on the other hand, contended that, even supposing *Brudenell v. Boughton* to have been well decided, yet it did not apply to a case like the present, but only to the case of a general charge of legacies; and he referred to *The Attorney-General v. Ward* [3 Ves. Jr. 327], *Kirke v. Kirke* [4 Russ. 435], *Beckett v. Harden* [4 M. & S. 1], and other cases.

We do not think that, in order to decide this case, we are bound to discuss, or indeed that we should be warranted in discussing, the question as to what effect a court of equity might give to the acts of this testator. The question for our decision is a mere legal question. The testator by his will gave to the defendant a legal interest in his lands (for an annuity charged on land, with a power of distress, is clearly a legal interest), and what we have to decide is, whether that legal interest has since been altered. We are clearly of opinion that it has not. It is clear, that if the annuitant had nothing but the land to resort to, her interest would have remained unaltered, for the reasons already mentioned, and the circumstance that she may, through the medium of a court of equity, have another fund liable to her demand, cannot possibly affect our judgment. A court of law cannot look to anything but the legal rights of the parties; if, by means of the erasure and codicil, that which was originally a right to or a security for £600 *per annum*, has now become a security for £200 *per annum* only, the parties injured by the attempt to enforce the larger demand must have recourse to a court of equity for relief. The legal interest remains as it was originally.

That legal interest is a rent-charge of £600 *per annum*, created by a will duly executed and attested. The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi*. It

has not been affected by the codicil, for the codicil is not duly attested, and therefore cannot even be looked at, so far as the real estate is concerned. On this short ground there must be

*Judgment for the defendant.*¹

Martin, for the plaintiffs.

Cooté, contra.

TUPPER v. TUPPER.

CHANCERY. 1855.

[*Reported 1 K. & J. 665.*]

WILLIAM GEORGE TUPPER made his will in 1851. After a profession of religious faith, it contained the following provision: "In acknowledgment to Almighty God that all I have is His already, and that I am but His steward, I hereby offer to Him the sum of £850, being about one tenth of my property; which sum of £850 I desire may be raised by my executors hereinafter named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate, and paid by them in manner following (that is to say): To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places, the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250." And after giving some pecuniary legacies, the testator gave all the residue of his property, and appointed executors.

By a codicil, dated in 1853, he made the following gift: "Whereas I have in and by my said will desired my executors therein named to pay the following legacies, namely: To the treasurer for the time being of the Missionary College of Saint Augustine, at Canterbury, the sum of £300; to the treasurer for the time being of the Society for Promoting the Employment of Additional Curates in Populous Places the sum of £300; and to the treasurer for the time being of the Tithe Redemption Trust, the sum of £250; now I do hereby revoke the before-mentioned legacies, and in lieu thereof I give and bequeath to the treasurer for the time being of the House of Charity in Rose Street, Soho, aforesaid, the sum of £1,000, for the extension fund of the said House of Charity; which I direct may be raised by the executors in my said will named out of my pure personal estate, and such as I am by law entitled to dispose of and appropriate."

The extension fund of the said House of Charity was a fund which was being raised for the purpose of providing a freehold site and a suit-

¹ See, accord, *Kirke v. Kirke*, 4 Russ. 495 (1828); *Brooke v. Kent*, 3 Moo. P. C. 384 (1841); *Soar v. Dolman*, 3 Curt. 121 (1842); *Goods of Nelson*, Ir. R. 6 Eq. 569 (1872); *Goods of Greenwood*, L. R. [1892] P. 7.

able building for the purposes of the said institution, instead of the house now occupied.¹

Mr. Charles Hall, for the executors and two of the residuary legatees.

Mr. C. G. Smith, for other residuary legatees.

Mr. Haddan, for the treasurer of the House of Charity.

Mr. Daniel, Q. C., and *Mr. Batten*, for the treasurer of the Tithe Redemption Trust.

Mr. Cotton, for the Treasurer of the Charity for Promoting the Employment of Additional Curates.

VICE-CHANCELLOR SIR W. PAGE WOOD. There is some difficulty in this case, because, although the difference may not be very striking, it is not precisely the case of a gift to an object incompetent to take; but I think that it falls within the principle of the case in which there was a devise to a parish; and that to make a distinction between them would be carrying the refinements, which have gone very far already, farther than would be advisable. I concede that it is very difficult to make a satisfactory distinction between *Onions v. Tyrer*, 1 P. Wms. 343, and those cases in which the gift fails for want of capacity in the devisee to take. There is this difference, that, in cases like *Onions v. Tyrer*, the testator is making an instrument, which he intends to be effective as a whole, and the law takes away one half, in the same manner as though it cut off the operative half of the instrument, leaving only the revoking part of the will; and it may be said, that it was the intention of the testator that the instrument should operate in an entire and not in a mutilated form; while in the other cases, where the testator has made certain gifts, which are invalid in law, the instrument is in a sense operative, but the party to take under it is not allowed to receive the benefit.

It has been argued, that the law does not render the treasurer of a charity absolutely incapable of taking, but only makes void the gift to him in trust for the purposes of this charity; and therefore, that this part of the will is blotted out; and that makes the case still more like *Onions v. Tyrer*. I think, however, that though something is to be said for it, that is too fine a distinction to make any real difference between this case and that in which there was a gift to a parish. Although the law would prevent that from taking effect either by deed or will, yet being by will, in which the testator manifested an intention to revoke a previous gift, it was held that the revocation must take effect, although the gift was void. *French's Case*, Roll. Abr. "Devise," O. 4.

In this case the gift is to a charity, and regarding the solemn introduction to his will, it is probable that the testator did not intend to withdraw from pious uses the sum which he had set apart for them; but that does not indicate an intention that the legatees whose legacies he revokes should remain recipients of his bounty. He expressly says by the codicil, that they shall not receive anything, but that the fund

¹ The statement of the case is abbreviated from that in the report.

shall be given to another object; and though this latter cannot take it, I cannot speculate on whom he might wish to confer the benefit in such an event. He desired to devote the money to charity generally. The law prevents the particular object which he has designated from taking anything, and I must hold that the revocation remains in force, though the gift by the codicil may be void.¹

POWELL v. POWELL.

COURT OF PROBATE. 1866.

[Reported L. R. 1 P. & D. 209.]

SIR J. P. WILDE.² The testator in this case made a will on the 3rd of March, 1862, and a second will, revoking the first, on the 29th of March, 1864. In 1865 he destroyed the will of 1864, and the question is, whether, by that act of destruction, the will of 1864 has been legally revoked, seeing that his object in the act of destruction was to set up the will of 1862. It is not contended that effect could be given by law to this object, but failing that, it is argued that effect ought not to be given to the destruction of the will of 1864 as an act of revocation. I conceive that the doctrine of dependent relative revocation properly applies to facts such as this case involves. This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi*, it is no revocation. What, then, if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted, and such has been the course of decision in the various cases quoted in argument. But then it is said, that this method of reasoning has only hitherto been applied to cases in which the destruction of the script has accompanied the execution of the instrument intended in substitution; and that no decided case can be found in which the instrument intended to be established has been a long previously executed paper. But I fail to perceive a distinction in principle between the two cases. For what does it matter whether a testator were to say, "I tear this will of 1860 because I have this day (1st of

¹ See *Price v. Maxwell*, 28 Pa. 23 (1857).

² The opinion only is here given.

January, 1861) executed another designed to replace it;" or, "I tear this will of 1860 because I desire and expect that the effect of my so doing will be to set up my old will of 1840?" In either case the revocatory act is based on a condition, which the testator imagines is fulfilled. In both cases the act is referable, not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present. It is only necessary to add that, in the above observations, it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. And such was, I think, upon the evidence given in this case, the reasonable conclusion of fact. Cases may, and probably will, arise in which the intention is either mixed or ambiguous, and such are for future consideration. The only case cited that requires special mention is that of *Dickinson v. Swatman*, 30 L. J. (P. M. & A.) 84. But Sir C. Cresswell, in that case, does not appear to have been satisfied that the sole intention in destroying was to set up the previous will. He is reported to have said, "At all events, to make it a case of dependent relative revocation, you would have to show that he did not intend to revoke the second will unless by doing so the first would have been revived."

The court pronounces, therefore, for the will of the 29th of March, 1864, as contained in the draft thereof produced and sworn to by Mr. Newman, the attorney who made it.

The costs of all parties out of estate.

Bayford appeared for the plaintiff and the intervener.

Dr. Tristram, for the defendant.

QUINN v. BUTLER.

CHANCERY. 1868.

[Reported L. R. 6 Eq. 225.]

RICHARD FOWLER BUTLER was, under the will of his father Thomas L. Butler, empowered by deed or will to charge certain hereditaments thereby devised with the payment of any sum or sums of money not exceeding £7,000 as a provision for his younger children, the same to go and be paid to or divided among them in such shares as the said Richard Fowler Butler by deed or will should appoint, and in default of such appointment to go to and be divided amongst all such children equally.

Richard Fowler Butler, by his will, dated the 13th of November, 1856, after reciting the above-mentioned power, in exercise thereof charged the said hereditaments with the payment of the sum of £7,000

in manner thereafter mentioned (that is to say), £4 000, part thereof, to be paid to his son, Robert Henry Fowler Butler, in case he should attain the age of twenty-one years: and the sum of £3,000, residue thereof, to be paid to his said three daughters, Eleanor Quinn, Sarah Fowler Butler, and Mary Fowler Butler, in equal shares as tenants in common, and in case of the decease of the said Robert Henry F. Butler, before he should have attained the age of twenty-one years, then the said sum of £4,000 to be paid to and divided amongst his said three daughters in the like manner as the said sum of £3,000.

By a codicil, dated the 7th of September, 1861, Richard Fowler Butler, after reciting the appointment made by his will, proceeded as follows: "I hereby revoke and make void the bequest and appointment or charge of the said sum of £7,000 so made by my said will as aforesaid; and I, the said R. F. Butler, in exercise and by force and virtue of the powers or authorities given me in the said will of the said T. L. Fowler, and of all other powers enabling me in this behalf, do hereby subject, charge, and make liable all and every the manors, messuages, farms, lands, and hereditaments devised by the said will of the said T. L. Fowler, to and with the payment to my son Robert F. Butler, who has attained the age of twenty-one years, of the sum of £7,000 sterling money, and in all other respects I confirm my said will."

The suit was instituted by Eleanor Quinn and her husband for the purpose (amongst others) of obtaining a declaration that Eleanor Quinn was entitled to have her share under the will of Richard Fowler Butler raised out of the hereditaments on which the £7,000 was charged; and it now came on to be heard upon further consideration.

Mr. Baggallay, Q. C., *Mr. Eddis*, and *Mr. Winn* (of the Irish Bar), for the plaintiffs.

Mr. Southgate, Q. C., for Sarah Fowler Butler and Mary Fowler Butler, stated that they declined to claim any benefit under the will of Richard Fowler Butler.

Mr. Jessel, Q. C., and *Mr. North*, for Robert Fowler Butler, who, by the death of an elder brother, had become entitled to the estates charged with the payment of £7,000.

Mr. Bristowe, for trustees.

LORD ROMILLY, M. R. In this case I am of opinion that the codicil is a simple revocation of the appointment made by the will, and nothing more.

I think the whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favor of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions v. Tyrer*, 1 P. Wms. 343, applies. The case has generally arisen where there has been a defective execution of the second instrument.

Here there can be no doubt that the intention was to revoke the will altogether. The codicil is an absolute and positive revocation of the charge: then there is a new charge of £7,000, and the whole of that is

given to the son. That gift is void, because the testator had not an exclusive power of appointment. I entirely assent to the observation of Lord Justice Page Wood in *Tupper v. Tupper*, 1 K. & J. 665, where he remarks that the testator expressly says by the codicil that the legatees shall not receive anything, but that the fund shall be given to another object; and that although this latter person cannot take the gift, the court cannot speculate on whom the testator might have wished to confer the benefit in such an event. That case was decided on an old case, *French's Case*, in Rolle's Abridgment, Devise, O. 4, to the same effect.

I think it is impossible to draw a distinction so technical as to say that the codicil shall prevail or not according as the person named in it can take or not. The reasonable view is to consider the intention of the testator; and here I think the codicil revoked the old appointment and charge, but did not set up a new one.¹

GOODS OF McCABE.

COURT OF PROBATE. 1873.

[Reported L. R. 3 P. & D. 94.]

ESTHER JEREMY McCABE, late of Ticehurst, Sussex, spinster, died on the 3d of March, 1873, having made a will dated the 27th of August, 1863, in which she appointed Robert Jeremy McCabe sole executor. The will was found by deceased's sister, Mrs. Laming, after the death of Miss McCabe, in a davenport in Mrs. Laming's house, the property of the deceased. It was in an envelope which had been sealed, but the seal had been broken. The will was entirely in the handwriting of the deceased, and contained the following clauses: "After payment of all the above legacies, I will and bequeath to my sister Caroline Jeremy Luro half of the sum of money remaining undisposed of, and to my sister *Louisa* Galsworthy the remaining half of the same sum . . . To my sister *Louisa Jeremy Galsworthy* I leave, as a remembrance, the print hanging at present in my bed-room. And the whole of the remainder of my personal effects and property of whatsoever nature, excepting any sum of money which may remain after payment of all the above-mentioned legacies, I leave to my *nieces and nephews*." The words in italics were written on erasures, but the attesting witnesses could give no information or explanation whatever in reference to them. Messrs. Chabot and Netherclift were of opinion that the words written under sister *Louisa*, in the first paragraph, were niece *Edith*. Mr. Galsworthy, in his affidavit, stated that at the date of the will, the 27th of August, 1863, his wife Louisa Galsworthy was seriously ill, a fact well known to the testatrix, and it was not expected

¹ See *Hairston v. Hairston*, 30 Miss. 276 (1855).

either by her husband, by the testatrix, or any other member of the family, that she would recover; and that he had no doubt that by reason thereof the testatrix believed that any bequest of a share of her property to her sister would be inoperative, and she determined to give such share to Louisa Galsworthy's only child Edith, to whom testatrix was much attached. At the end of the year 1864 Louisa Galsworthy completely recovered from her illness, and the fact of such recovery was known to the testatrix, who visited her sister in 1865. In consequence of the recovery of her sister, the testatrix probably erased, or attempted to erase, the words *niece Edith* from the will, in order to substitute in the place thereof the name of her sister, and in consequence of the space being insufficient for the full name, left out the word *Jeremy*, which in other cases she had always used. Louisa Galsworthy died in October, 1866, and from that time the testatrix was incompetent to manage her affairs, or make a new will.

June 10. Dr. Tristram, for the executor, applied for probate. As there is no evidence at what time the words inserted were introduced, the presumption is that they were so after execution, and they will be omitted; and as there is no satisfactory evidence what the words erased were, the probate will go in blank as to them.

Dr. Deane, Q. C., Dr. Spinks, Q. C., and Indervick, appeared for Miss Edith Galsworthy and other parties interested.

Cur. adv. vult.

June 24. SIR J. HANNEN. By the will of the testatrix, as found at her death, half the residue of her money was left to her sister Louisa Galsworthy; the words *sister Louisa* were written on an erasure, and as the attesting witnesses could give no explanation of the alteration, these words must be rejected. But it is alleged that the words erased were *niece Edith*. It is stated by Messrs. Chabot and Netherclift that they can, with the assistance of a magnifying-glass, read these words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, and I am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts, for the Statute of Wills gives no effect to obliterations, except so far as the original words shall not be apparent. And this has been decided to mean, "apparent on an inspection of the instrument," not "apparent by extrinsic evidence:" *Townley v. Watson*, 3 Curt. 761. But as this is a case not merely of obliteration, but of substitution, I am at liberty to inquire whether the testatrix did not intend only to revoke the original bequest, on the supposition that she had effectually substituted another. This is established by the cases of *Brooke v. Kent*, 3 Moo. P. C. 334; *In the Goods of Harris*, 1 Sw. & Tr. 536; *In the Goods of Parr*, 29 L. J. (P. M. & A.) 70; 6 Jur. (N.S.) 56. In the last-named case Sir C. Cresswell expressed a doubt whether the doctrine of dependent relative revocation could be applied to cases

where not merely an appointment of a fresh executor was attempted, but a new legatee was substituted; but the judgment of Sir W. Grant, in the case *Ex parte Earl of Ilchester*, 7 Ves. 372, shows that the doctrine is equally applicable where the later invalid will or bequest is in favor of a different person to the one named in the earlier. The designation of a fresh legatee is, no doubt, an important circumstance to be considered in determining the question of fact, whether the destruction or obliteration was intended to be dependent on the efficacy of the substituted disposition; but where that is clear, the nature or extent of the contemplated alterations are immaterial. This is well illustrated by the circumstances of the present case. If the words written on the first erasure be rejected, the bequest in the will will run thus: "to my ——— *Galsworthy*." This makes it clear that the bequest was to some connection of the deceased of the name of *Galsworthy*. Her only relatives of that name were her sister, her sister's husband, and her sister's daughter. The facts stated in the affidavit of Mr. *Galsworthy* make it in the highest degree probable that the bequest was not originally made to the deceased's sister, because she was then dangerously ill and expected to die. In this state of things, it was natural that the bequest should be made to one of her family, as it is clear it was, but it cannot be supposed that the testatrix intended to revoke a bequest made under such circumstances absolutely, and without reference to her desire to substitute the name of her sister, who had been restored to health. I cannot have a doubt that she would not have obliterated the name of that member of her family of the name of *Galsworthy*, which originally stood in the will, if she had not believed that she could validly substitute the name of her sister; and if this be so, the doctrine of dependent relative revocation is applicable, and I am at liberty to have recourse to any means of legal proof to establish what the obliterated words were. In this inquiry I accept the evidence of the experts to this extent, namely, that that which is visible of the remains of the letters which are obliterated is consistent with the theory that the words were *niece Edith*, and inconsistent with the theory that they were *brother-in-law*, or any other words which can be reasonably suggested to fill up the blank between *my* and *Galsworthy*; and taking this in combination with the other evidence as a whole, I come to the conclusion that the words obliterated were "*niece Edith*," and I direct probate with those words restored. The other words written on erasures, not being accounted for, must be rejected.¹

¹ See *Simmons v. Rudall*, 1 Sim. N. S. 115 (1851); *Wolf v. Bollinger*, 62 Ill. 368 (1872). Cf. *Pringle v. M'Pherson*, 2 Brev. 279 (So. Car. 1809), p. 255, note, ante.

GOODS OF HORSFORD.

COURT OF PROBATE. 1874.

[*Reported L. R. 3 P. & D. 211.*]

GEORGE FAHIE HORSFORD, late a captain in Her Majesty's service, unattached, on the 1st of April, 1868, executed a will which was written on two sheets of foolscap paper. The writing covered five sides of the paper, terminating at the bottom of the fifth side, with a full attestation clause where the witnesses signed their names. At the top of the sixth side were the words, "To which will and testament I hereunto annex my seal and signature, dated this 1st day of April, in the year of our Lord 1868. — GEO. F. HORSFORD, Captain unattached." Pieces of paper were pasted over certain parts of the will with writing on them, as appears in the paragraphs following in italics: "I leave the interest on £309 9s. 6d. bank stock to my god-child, Rosina Horsford Wood; and in case of her death unmarried or, if married, childless, then to my brother, Sir Robert Marsh Horsford, Knt., C. B., for his lifetime, and afterwards the interest to my cousin Amelia Thorpe, widow of Colonel Thorpe, formerly of the 89th Regiment; and after her death the principal of the said bank stock to *Mary Ffinch, the eldest daughter of John Ffinch of Greenwich, Esquire, deceased.* I also leave and bequeath to my adopted god-child, Rosina Horsford Wood, for her sole use during her lifetime, the interest of the sum of £174 2s. 3d. reduced 3 per cent annuities, and, if she marry and have children, the principal to them after her decease. In case she should die single, or, if married, childless, the interest of the said amount will revert to my brother, Sir Robert Marsh Horsford, Knt., C. B., and then to my cousin, Amelia Thorpe, &c., and after her death the principal to *Mary Graham, daughter of the Rev. Leonard Graham, who married Lavinia Horsford.*" Sir Robert Marsh Horsford was appointed executor. On the 29th of July, 1874, the deceased executed a codicil to his will in the following manner. It was written on a sheet of foolscap paper, the writing covering the first and half the second sides of the sheet. Attached by a string, passing through the fold of the sheet about opposite to the termination of the writing, was a separate paper on which was written, "To which codicil I hereunto annex my seal and signature, dated this 29th day of July, 1874." This was followed by the signatures of the deceased and of the witnesses, Captain Hedley and Mrs. Bourne. The contents of the codicil, so far as material, were as follows: "Febry., 1870. Codicil to the will of Captain George Fahie Horsford. Should anything occur to prevent from death my will acting in any way I have stated, I leave and bequeath to Mrs. George Davies, formerly Rosina Horsford Wood, 82 Blake Street, Barrow-on-Furness, Lancashire, should she survive any children she may have, or in the event of her not having any, the whole of the money invested in my name in the different funds of the Bank of England, together with

my bank stock, for her sole use. I leave and bequeath *ten pounds, which will be found* with my photograph, to Emily Bush, the youngest daughter of Lieut.-Colonel J. T. Bush, late of the Honble. E. I. Service, Bengal Army, as a remembrance for kindly coming to see me when she was a little girl!" The words in italics were written on pieces of paper pasted over the original writing of the codicil. The witnesses, Captain Hedley and Mrs. Bourne, who attested both documents, in their affidavit, stated that at the execution of the will they had no opportunity of observing the earlier pages of it, and did not notice whether the strips of paper now pasted thereon were there at the time of attestation. That, as regards the codicil, they subscribed their names in the presence of the deceased and of each other, having been requested by testator to attest his signature thereto. That they did not see the will at the time of the execution of the codicil. That the codicil is now in the same plight and condition as it was at the time of attestation, save that they did not see the first page of the said codicil, and they are unable to say what was written on that page nor whether the pieces of paper were pasted on, or if anything was written thereon. That the writing on the second page of the codicil was then about the same as now.

The court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in court. On the 1st of December they were examined. Captain Hedley stated that he knew Captain Horsford, who had asked him on two occasions to witness papers. That in the summer of this year he was present in deceased's room. Mrs. Bourne, the landlady, was also there. He, Mrs. Bourne, and Captain Horsford, were only present. Deponent asked no questions. He could not say whether he saw deceased's signature. Deceased asked him to witness a paper. He did not recollect whether there was a name on the paper. It was a sitting-room. Deceased was standing. There were pens and ink on the table. He could not recollect anything else. The deceased asked him to sign, which he did. He believed the paper was then attached as now. He did not notice the deceased's name, or whether the paper was signed. He was not accustomed to business. Mrs. Bourne deposed that Captain Horsford lodged in her house. He had asked her to witness papers twice. In the summer, about July last, he asked her to come into his room with Captain Hedley to sign a paper. She did not see him sign it. It was signed before she entered the room. Captain Hedley was in the room before she was. She saw Captain Hedley sign. Captain Horsford produced the paper. To the best of her recollection all the writing as it now appears on the paper was there when she signed.

Nov. 10. *Nugent* applied to the court to grant probate of the will and codicil. He referred to *In the Goods of Huckvale*, Law Rep. 1 P. & M. 375; *In the Goods of Puddephatt*, Law Rep. 2 P. & M. 97.

Cur. adv. vult.

Dec. 2. SIR J. HANNEN. The testator, George Fahie Horsford, deceased, made his will, bearing date the 1st day of April, 1868. It covers four pages of a sheet of foolscap, and continues on the fifth page, being the first of a second sheet. At the bottom of the fifth page is a formal attestation clause, and the signature of the witnesses are added below the clause. The signature of the testator appears at the top of the sixth page, preceded by these words: "To which will and testament I hereunto annex my seal and signature, dated this 1st April, in the year of our Lord 1848." The attesting witnesses state that, to the best of their recollection, the testator showed and acknowledged to them his signature, signed on the will on the upper part of the sixth page of the said paper, and that then they signed the attestation thereof. I think that the execution of the will by the testator is valid, notwithstanding the position of the signature, by virtue of the Statute 15 Vict. c. 24. There is also a codicil, dated the 29th of July, 1874, in which the signature and attestation of the witnesses are on a separate sheet, attached by a string to the codicil. The evidence of the attesting witnesses is not very clear as to what occurred at the time of execution, but I have come to the conclusion that the sheet was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before the attestation. A further question arose as to certain obliterations which appear upon the will and codicil, and of which the attesting witnesses were unable to give any account. Strips of paper have been pasted over portions of the original will and codicil, and on some of these strips, words have been written by the testator, by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made, it must be presumed that they were so added after the execution of the will and codicil. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will or codicil with the hidden passages in blank, or ought I to endeavor to ascertain what words have been covered up, and include them in the probate? As to the will, the answer to these questions depends upon the construction to be put on the twenty-first section of the Statute 1 Vict. c. 26, by which it is enacted that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. Soon after the passing of the Act, Sir H. J. Fust, in *Townley v. Watson*, 3 Curt. 761, decided that the construction to be put upon the words of the twenty-first section was that the effect of the will before the alterations must be apparent on the face of the instrument itself. He said: "What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the Legislature really intended that extrinsic evidence should

be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned: 'unless the words shall be capable of being made apparent'?" I think it is impossible to read the words of the Statute, and not say that it was the intention of the Legislature that, if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament. Mr. Justice Williams (*Executors*, page 139, 6th ed., in a note) says: "In a case before Sir H. J. Fust, he ordered that the erasures in a will should be carefully examined in the registry with the help of glasses, by persons accustomed to writing, to ascertain whether the words could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Generally speaking, the Ecclesiastical Court will not in the first instance take upon itself to decide whether the words obliterated can or cannot be made out. It must be proved." But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means. I think that the word "apparent" in the twenty-first section means apparent on the face of the instrument in the condition in which it was left by the testator, and that if he has had recourse to extraordinary means to obliterate what he had written, then this court is not bound to take any steps to undo what he had done. The Statute does not draw any distinction between different modes of obliteration. The effacement of the original writing as performed by this testator, by pasting paper over it, is complete, and I can see no reason why the court should remove the pasted paper used as the instrument of obliteration, rather than ink used for the same purpose. I shall therefore give no directions on the subject so far as the will is concerned; and, assuming that the words covered over cannot be ascertained by inspection, the probate must go with those parts in blank. But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this, I am in a position to infer that the testator's intention was only to revoke that portion of the codicil which was covered in the event of his having effectually substituted another bequest in its place, and thus the doctrine of dependent relative revocation becomes applicable. As to these alterations, the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and amongst such means, the removal of the strips of paper is the most obvious. I therefore direct that the strip on which is written the word *ten*, as well as the strip on which are written the words *which will be found with* (to which the same

remarks are applicable) be removed in the registry from the codicil, and that probate be granted of that instrument in its unaltered condition.

SEMMESE v. SEMMES.

COURT OF APPEALS OF MARYLAND. 1826.

[Reported 7 H. & J. 388.]

APPEAL from a decree of the Orphans Court of Charles County, refusing to admit to probate and record a paper offered as the last will and testament of Ignatius Semmes, deceased.

The cause (which is sufficiently explained in the opinion delivered by this court) was argued before BUCHANAN, C. J., and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Stonestreet, for the appellant.

C. Dorsey and Brawner, for the appellees.

Taney, in reply.

BUCHANAN, C. J., delivered the opinion of the court. It is objected, on the part of the appellant, that the Orphans Court did wrong in not admitting to probate a paper, purporting to have been a duly executed will of Ignatius Semmes, on two grounds: First. Because the obliterating the name of Ignatius Semmes, and also the names of the three subscribing witnesses, does not appear to have been done by the deceased; and secondly: That if it was, it did not amount to a revocation of the will.

With respect to the first proposition, it does not appear to admit of a doubt, that each obliteration was made by the deceased Ignatius Semmes.

The *memorandum* at the foot of the paper, and just below the signatures, in these words — “In consequence of the death of my wife, it is become necessary to make another will,” and signed Ignatius Semmes, is admitted to be in his handwriting. The obliterations were made by drawing a pen frequently, and in different directions, across his own signature, and the names of the subscribing witnesses; and the ink with which it was done, is proved to have been the same with which the memorandum at the foot of that paper was written. Hence it is manifest, that the obliterations, and the memorandum, were simultaneous acts, and by the deceased himself; and it would be straining overmuch to admit the supposition, that it might have been surreptitiously done by another, in the absence of any testimony to cast the slightest shade of suspicion upon anybody. The memorandum must be considered as connected with the obliterations as a part of the *res gesta*, and as explanatory of the transaction. It is equivalent to a declaration, that he had made the obliterations, for the reason assigned (the death of his wife), which made it necessary to make another will.

Considering then the obliterations to have been made by the deceased,

the second objection presents itself, to wit, that the will was not thereby revoked; in support of which several authorities were cited and relied on in argument, but none of them sustain the proposition, and it would be somewhat strange if they did.

In *Onions v. Tyrer*, 1 P. Williams, 343, the deceased, by a will duly executed to pass real estate, devised lands to trustees, to certain uses, and afterwards made another will devising the same lands to other trustees, but to the same uses, with a clause of revocation of the first, and attested by three witnesses, who did not sign their names in the presence of the testator. Supposing the second will to be duly executed to pass real estate, the testator caused the first to be cancelled. But it was determined, that the witnesses to the second, not having signed their names in the presence of the testator, it was void as to the land, and could not therefore have the effect to revoke the former; and the cancelling of the first will, under the presumption that the second was good and effectual, was held not to amount to a revocation of it. on the ground that it was done by mistake. The case of *Hyde v. Hyde*, 8 Vin. Ab. 142, was clearly a case of mistake. And the case of *Mason v. Limbrey*, cited by Lord Mansfield, in 4 Burr. 2515, was decided on principles not at all applicable to this case.

The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi*. And where it is a dependent relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation. But never where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will.

It is said, and indeed it would seem from the testimony, that Ignatius Semmes did not intend to die intestate, but however that may be, we cannot make a will for him. By the will, which is now attempted to be set up, he had disposed of the whole of his estate to his wife, in trust for the "use and support of herself, and the benefit, education and support," of his infant son until he should arrive at the age of twenty-one years, when he bequeathed one half of his personal property absolutely to his wife; but she dying, he struck out his own signature, and the names of the subscribing witnesses, and made a memorandum at the bottom of the will, assigning as a reason for what he had done, that his wife's death had rendered it necessary to make another will. If that was not a revocation, it would be found difficult to revoke a will by cancelling. In *Burtenshaw v. Gilbert*, 1 Cowp. 49, which was cited in argument, there were two wills, and after the death of the party, the

second will, with a duplicate of the first, which he had kept himself, were found together among his papers both cancelled; and it was proved that he had sent for an attorney to prepare another will, but lost his senses before it could be done. It was not doubted that the second will was revoked. The only question raised, was whether the revocation of the second will did not set up the uncanceled duplicate of the first, and it was determined that it did not. That case surely cannot be called in aid of this will.

*Decree affirmed.*¹

¹ See, accord, *Banks v. Banks*, 65 Mo. 432 (1877); *Estate of Olmsted*, 122 Cal. 224, 232 (1898).

In *McIntyre v. McIntyre*, 120 Ga. 67 (1890), SIMMONS, C. J., said, p. 71: "Reference is made in the brief of counsel for the defendant in error to what is known as the doctrine of 'dependent relative revocation.' Under the operation of this doctrine it has been held that if a testator cancel or destroy a will, with a present intention to make a new will as a substitute for the old, and the new will is not made, or if made fails of effect for some reason, it will be presumed that the testator preferred the old will to an intestacy, and this testament will be given effect. We believe this doctrine to be sound, when properly understood and properly qualified. It is a doctrine of presumed intention, and has grown up as a result of an effort which courts always make to arrive at the real intention of the testator. Some of the cases appear to go to extreme lengths in the application of this doctrine, and seem to defeat the very intention at which they were seeking to arrive. The doctrine, as we understand it and are willing to apply it, is this: The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of the new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then if the new will be not made, or if made is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked, — if the act of revocation is completed, — as if the will be totally destroyed by burning and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which can not take effect, counts for nothing. In other words, evidence that the testator intended to make or did actually make a new will, which was inoperative, may throw light on the question of intention to revoke the old one, but it can never revive a will once completely revoked. See, on the subject, Page on Wills, § 276; Schoul. Wills (3d ed.) § 398; Pritch. Wills, § 272; 1 Woer. Am. Law Adm. (2d ed.) § 48, *90-91; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Banks v. Banks*, 65 Mo. 432; *Hairston v. Hairston*, 30 Miss. 276; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. R. 863; *Gardner v. Gardner* (N. H.), 8 L. R. A. 383; *Will of Penniman* (Minn.), 18 Am. R. 375; *Johnson v. Brailsford* (S. C.), 2 Nott & M. 272; *In re Olmsted's Est.* (Cal.), 54 P. 745, 747; *Thomas v. Thomas* (Minn.), 79 N. W. 104; *Townsend v. Howard* (Me.), 29 A. 1077; notes to *Graham v. Burch*, 28 Am. St. Rep. 345. Applying what has been said to the facts of the present case, the following result is reached: There was evidence from which the jury could have found that when the testator canceled the old will he intended to make a new one. The canceled paper itself bore evidence of such an intention. If this was his intention, and he did not intend for the cancellation to operate as a revocation unless the new will was made, then the finding ought to be in favor of the propounder. On the other hand, there was evidence from which a jury could find that the cancellation was intended to operate as a revocation; and if this is the truth, the finding ought to be against the will, notwithstanding it may appear that the testator contemplated

GIFFORD v. DYER.

SUPREME COURT OF RHODE ISLAND. 1852.

[Reported 2 R. I. 99.]

THIS was an appeal from a decree of the Court of Probate of Little Compton, proving and approving the last will and testament of Abigail Irish. The will was dated December 4, 1850, and the testatrix died December 6, 1850. After several bequests of small sums to the children of Robin Gifford and to others, she gives and bequeaths the rest and residue of her property, one half to John Dyer, who was her brother-in-law, and the other half to her two nephews, Jesse and Alexander Dyer. Robin Gifford, the only child of the testatrix, was not mentioned in the will. It appeared in evidence, that at the date of the will, Robin Gifford had been absent from home, leaving a family, for a period of ten years, unheard from; that all the neighbors considered him dead, and that his estate had been administered upon as of a person deceased. The scrivener who drew the will, testified as follows: "After I had read the will to her, she asked if it would make any difference if she did not mention her son. I asked if she considered him living. She said she supposed he had been dead for years; she said, if it would make any difference she would put his name in, for they will break the will if they can. I think that was the expression she used. I think she said what she had given to her grandchildren was in lieu of what he would have, but am not positive. I think her son left in 1841, and was not heard of to my knowledge. She was speaking of a home at Mr. Dyer's and said, what she had given him would pay him well. She said her grandchildren had not been to see her while she was sick." It appeared that the testatrix had resided with John Dyer for some time previous to her death.

Sheffield, for the appellant.

A. C. Greene, for the appellee.

GREENE, C. J., delivered the opinion of the court. It is very apparent in the present case, that the testatrix would have made the same will, had she known her son was living. She did not intend to give him anything, if living.

But if this were not apparent and she had made the will under a mistake as to the supposed death of her son, this could not be shown *dehors* the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake. Thus, where the testator revokes a legacy, upon the mistaken supposition that the legatee is dead, and this appears on the face of the instrument of revocation, such revocation was held void. *Campbell v. French*, 3 Vesey, 321.

the making of another will. These are questions for the jury to decide. The matter finally turns upon the intention of the testator, and no mere presumption can be allowed to defeat this intention when it has been made to appear."

SKIPWITH v. CABELL.

COURT OF APPEALS OF VIRGINIA. 1870.

[Reported 19 Grat. 758.]

BILL in equity¹ filed in equity by D. J. Hartsook, the executor of Mary W. Cabell, of Nelson County in Virginia, to obtain a construction of her will and codicils, and to have the direction of the court in the administration of her estate.

By the will, which was dated in 1859, the testatrix gave about fifty legacies. One of these was of \$1050 "to my friend Mrs. Fanny Taylor of Philadelphia." There were several codicils. By the second codicil, dated at the beginning February 28, 1861, and at the end August 18, 1861, after several legacies she gave \$1000 to Miss Cornelia Taylor of Philadelphia, \$2000 to Mrs. Lewis of Philadelphia, and then added: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. Carter of Philadelphia, and my cousin Peyton Skipwith of New Orleans; one half of which each must hold in trust for the benefit of their children." The sixth and last codicil, dated November 27, 1861, provided as follows: "In consequence of the state of the country, I now revoke my bequest to Dr. Charles Carter and his children, and also to Mrs. Fanny Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia." The testatrix died in December, 1861.

Hartsook, the executor, testified as follows:—

"Some time before her (Mrs. Cabell's) death, I was at her house, and she said she had made her will and had written it so plain that no difficulty could be made; and said she wanted the persons to whom she had given her property to get it as soon after her death as possible. I remarked to her, that under the Sequestration Act, if she had given property to any of her Northern friends, it might be confiscated, and that I mentioned it for her consideration. She thanked me, and said she had, and that she would revoke the bequests. On visiting her the next time, she remarked that she had revoked the bequests to her Northern friends on account of the state of the country. I then asked her if she had made any disposition of the property given in these revoked bequests, or whether she had any residuary clause to her will which would take it. She replied she had a residuary clause; and that would do. I told her that perhaps it would not. She replied, Well, I cannot help it now. She was suffering greatly and very feeble."

The Circuit Court held that the revocation in the codicil of November 27, 1861, took effect. Dr. Carter appealed.

¹ The following statement is substituted for that in the report, and only that part of the case which touches the question of revocation is given.

Howison, for Dr. Carter.

Baldwin, Lyons, Young, Halyburton, Giles, and J. Alfred Jones, for other parties in interest.

JOHNES, J. The second codicil is dated, at the beginning, February 28, 1861, and at the end is the date August 18, 1861. On the 27th day of November, 1861, the testatrix made a sixth codicil, as follows :

"In consequence of the state of the country, I now revoke my bequests to Dr. Carter and his children, and also to Mrs. Fanny Taylor, her daughter Miss Cornelia Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia." It is contended on behalf of Dr. Carter and his children, that this revocation is inoperative and void, because made under a mistake. To establish the alleged mistake, they refer to the testimony of Mr. Hartsook, who says that in a conversation with the testatrix, he suggested to her, for her consideration, that if she had given property to any of her Northern friends, it might be confiscated under the Sequestration Act [of the Confederate States] — that she replied, that she had done so, and would revoke the bequests; and that she subsequently told him that she had revoked the bequests to her Northern friends, in consequence of the state of the country. The alleged mistake is, that she supposed that these legacies, if not revoked, would or might be confiscated, whereas, it is insisted, the Sequestration Act was wholly void in law; and, moreover, did not confiscate the *corpus* of any property, but only sequestered the profits.

The most that can be made of this evidence is, that the testatrix had been advised by the witness, as his opinion, that the legacies referred to would be liable to confiscation, and that she adopted that opinion by making the revocation. But it is laid down, that if a revocation is made dependent upon the information received by the testator, or upon his belief or opinion, the act will be held valid, notwithstanding he may have been misinformed, or under a misapprehension. 1 Redfield on Wills, 358, pl. 25. It is as if she had said, "I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them." She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation cannot be set aside by showing that the advice was unsound. 1 Powell on Devises, 527; *Atto. Genl. v. Lloyd*, 3 Atk. R. 551. Besides, it has not been shown that the testatrix was under any mistake. The counsel admits that the profits of the legacies would have been liable to confiscation, or to sequestration, which was practically the same thing: and this may have been just what she apprehended. We ought to presume so, if this was the only sort of confiscation that was lawful or usual. And if she apprehended confiscation of the whole, it has not been shown that the apprehension was unfounded.

But the codicil does not state any fact upon the supposition of whose existence the testatrix proceeded in making this revocation. All that

she says is, that she revokes the bequests, "in consequence of the state of the country." What there was in the state of the country that caused her to do so, or what she thought or feared in regard to the state of the country, does not appear on the face of the will. In the cases cited by counsel, the fact which the testator assumed to exist, and the assumed existence of which induced the revocation, appeared on the face of the will. But here we are asked to go outside of the will, and to ascertain from parol evidence what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake. No case has been found in which this has been allowed, and to allow it would violate fundamental principles.

The Circuit Court, therefore, was right in holding, that the revocation was valid and effectual.¹

IN RE KNAPEN'S WILL.

SUPREME COURT OF VERMONT. 1903.

[Reported 75 Vt. 146.]

APPEAL from a decree of the Probate Court establishing an instrument as the will of Sabina Knapen. Heard on an agreed statement of facts, at the March Term, 1902, Rutland County, *Watson, J.*, presiding. Judgment disallowing the will. The proponent excepted.

Lawrence & Lawrence for the proponent.

Joel C. Baker for the contestants.

STAFFORD, J. The testatrix made and executed her will in due form of law, and the same is still decipherable. But afterwards she attempted to make various changes therein without complying or attempting to comply with the requirements of the statute; and the question is threefold, — whether the will is to be established as it was when it was executed, disregarding the attempted changes; or to be disallowed as having been wholly revoked thereby; or to be established as originally executed, except as to certain clauses, and as to those to be treated as revoked by cancellation.

The will, as executed, made some special bequests, and several money bequests, and then added a residuary clause in favor of the testatrix' two sisters, Susan Tupper and Margaret Vaux. In this clause a pen and ink line has been drawn through the name "Margaret Vaux." In the margin opposite has been written in ink the word "deceased;" and at the end of the clause have been added, also in ink, the words, "Share with Mrs. Ada Stabb." The original will was type-written, and all the attempted changes made with a pen are, it is agreed, in the handwriting of the testatrix.

In one of the early clauses there was a bequest to the same Margaret Vaux of five hundred dollars. Here the name "Margaret" has been drawn through with a line in ink, and the word "deceased" written in

¹ See *Dunham v. Acerill*, 45 Conn. 61 (1877).

the margin opposite; and to the clause have been added the words, "to be given to Mrs. Ada Vaux Stabb."

The next clause originally read as follows: "I give and bequeath to the two daughters of my said sister Margaret Vaux, Bessie and Ada, each, the sum of three hundred dollars. I also give to the said Bessie and Ada, each, one half dozen silver teaspoons. I also give to the said Ada Vaux my gold watch." The changes made are these: The name "Bessie" has been drawn through with an ink line where it first occurs and marked over with a pencil in the other place. The word "watch" has been marked over with a pencil. To the clause have been added in ink the words, "To be given to Mrs. Ada Vaux Stabb;" and these words have been marked over with a pencil.

In the next clause but one, a bequest of two hundred dollars has been changed by writing in ink the word "four" over the word "two," and by writing in the margin the word "four" and the figures "400." In the next clause the name of the legatee and the words designating the amount have been drawn through with an ink line. Other similar changes have been made. New bequests have been written in the margins, and one of these has been marked over with a pencil.

First, then, do the attempted changes constitute a revocation of the will? V. S. 2354, following the English Statute of Frauds, declares: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing, executed as provided in case of wills; or by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator himself, or by some other person in his presence and by his express direction." Do the alterations amount to a revocation of the will by cancellation? The agreed statement of facts does not say that the alterations were made with the intention of revoking the will, and, judging from the alterations themselves, there was no intention to revoke the will as a whole, but, on the contrary, an intention to have it stand with certain changes. There is no interference with the formal parts, and no intention to revoke the whole is anywhere expressed. In these important respects the case differs from *Warner v. Warner's Est.*, 37 Vt. 356, 367, where the testator had written across one page of the instrument, "This will is hereby cancelled and annulled," and under the filing on the outside, "Cancelled and is null and void. I. Warner," and had erased the words, "In testimony whereof I have." We think the attempted changes in the present case cannot be said, as matter of law, to amount to a revocation of the whole will by cancellation, for although they would, if effectual, make of it a very different instrument, yet it cannot be said therefrom that the testatrix would not have left the instrument as it was in the first place, rather than have died intestate.

The interlineations of new and independent bequests are, of course, ineffectual. Neither do they invalidate the will, which was properly executed in its original form. *Wheeler v. Bent*, 7 Pick. 61; *Jackson v. Holloway*, 7 Johns. 394.

Do any of the attempted cancellations of separate clauses constitute a revocation of the will to that extent? If we admit that in some circumstances there may be a partial revocation, we have to take note of certain complications in the present case. This will contains a residuary clause, and every cancellation of a money legacy, and probably, as this will is written, every cancellation of a specific legacy as well, works a corresponding increase in the residuary clause. *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32. If there had been no residuary clause, the cancellation of a legacy would merely have left that part of the estate to be distributed as if no will had been made, and the rest of the will would operate as before; but here the cancellation gives the residuary clause a different operation. This has been held to prevent the attempted cancellation from operating as a partial revocation. *Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176. But if we should hold otherwise upon this point, as was done in *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32, we must notice a further difficulty. The testatrix has attempted to substitute a new residuary legatee in place of her deceased sister, Margaret; thus coupling the cancellation of previous bequests, and the consequent enlargement of the residuary bequest, with the substitution of a new residuary legatee; so that it is impossible to say that she would have desired to make any of the cancellations if she had not supposed that the new residuary legatee would receive the benefit arising therefrom. In short, the alterations, when taken together, rebut the presumption of an intention to cancel any clause by itself and independently of other attempted changes and additions which are ineffectual for want of formality.

An act which might otherwise amount to a cancellation of an entire will has been held not to work that result because accompanied by other acts showing that the intention to cancel was conditional, and not absolute, as where the testator wrote upon the will the word "Cancelled," but further wrote that he intended making another will, "whereupon I shall destroy this." *In re Brewster*, 6 Jur. (N. S.) 56, 29 L. J. P. and D. 69; Woerner's Am. Law of Administration, sec. 48, with citations. So, likewise, where the testator includes an express clause of revocation in a later will, which fails to take effect through some defect therein, but not where it fails through some cause *dehors* the instrument. *Hairston v. Hairston*, 30 Miss. 276.

Jarman on Wills, vol. I, p. 294, states the rule thus: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails, also, and the original will remains in force." The words "or any other cause" may give the rule too much breadth, but they may be omitted without impairing the rule for our purpose. Similarly it is said with respect to partial obliterations

or cancellations that if they are made with the intention of substituting other words for those cancelled, and such intention is frustrated, there is no revocation. Woerner's Am. Law of Administration, sec. 49; Jarman on Wills, vol. I, p. 295, with the cases cited by both authors.

As before remarked, the agreed statement upon which this case is tried, while it says that the alterations are all in the testatrix' handwriting, does not say with what intention they were made. Consequently we can assume only such intention as the acts necessarily imply. The intention to revoke is indispensable to a revocation, whatever the act may be; and here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependently upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing; and the will must be established as it was originally executed.

Judgment reversed and cause remanded.

D. Revocation by Circumstances.

OVERBURY v. OVERBURY.

COURT OF DELEGATES. 1682.

[Reported 2 Show. 242.]

UPON an appeal before sentence to the delegates, IT WAS ADJUDGED, that if a man make his will and dispose of his personal estate amongst his relations, and afterwards has children and dies, that this is a revocation of his will, according to the notion of the civilians, this being an *inofficiosum testamentum*.

LUGG v. LUGG.

COURT OF DELEGATES. 1696.

[Reported 2 Salk. 592.]

BEFORE a Commission of Delegates. One being single, made his will, and devised all his personal estate to J. S. Afterwards he married and had several children, and died without other will or disposition, and now *coram Delegatis*, of which TREBY, C. J. was one, it was ruled, that there being such an alteration in his estate, and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind.

BROWN v. THOMPSON.

CHANCERY. 1702.

[Reported 1 Eq. Cas. Ab. 413.]

J. S., BEING a bachelor, made his will, and devised a legacy of £500 to his brother, and other legacies to other persons, and devised his real estate to Eliz. Close and her heirs, and afterwards intermarries with the same Eliz. Close, and died, leaving her *privement enseint* with a son, without making any alteration in his will; and the main question in the case was, whether this alteration in the testator's circumstances did of itself, without more ado, amount to a revocation of the will. LORD KEEPER [SIR NATHAN WRIGHT] was clear of opinion, that alteration of circumstances might be a revocation of a will of lands as well as of a personal estate; and that notwithstanding the Statute of Frauds and Perjuries, which does not extend to an implied revocation; but no such alteration appears here, for no injury is done to any person; and those are provided for whom the testator was most bound to provide for; and so established the will.¹

CHRISTOPHER v. CHRISTOPHER.

EXCHEQUER. IN EQUITY. 1771.

[Reported Dick. 445.]

THIS cause stood for judgment.

MR. BARON PERROT. This bill is brought by the heir at law of Daniel Christopher, deceased, to have a will made by him revoked; to have an account of the profits of his real estate, and an account of his personal estate, and to have an allowance settled for his maintenance upon this case.

Daniel Christopher, by will, dated 17th December, 1757, being at that time a married man, but without issue, devised his real and personal estate to his then wife for life; remainder to his brother, the defendant Christopher in fee, and absolute property.

The wife died in 1761, and on the 10th of November, 1763, the testator married Elizabeth, a defendant in this cause, and died in 1764, leaving his said wife, and one child, the plaintiff, and without having revoked his will.

¹ SIR JOHN TREVOR, M. R., had, in the previous year, held in this case that the will was revoked. See 1 P. Wms. 304, *note*. — ED.

The Baron said, he found he differed in opinion with his brothers; but this he was the less concerned at, as perhaps it might be the means to carry to the last resort a question which he thought of the greatest consequence to the subject, and by these means every court would in future be uniform in their opinion upon it.

That the Spiritual Court had already determined the will in question to be revoked by the alteration of the circumstances, in which the testator was as above mentioned; but he was of opinion it was not a revocation of a will of lands.

Every one knew, he observed, that both before and since the Statutes enabling a man to devise lands, such wills might be revoked by parol, or any other such mode, which manifested an alteration of intent, in the mind of the testator. This let in many inconveniences at the expense of perjury, and occasioned the making of the Statute of Frauds, the preamble of which the Baron stated, and the 5th section of the mode of devising lands, and observed the difference between the penning of the two clauses, relating to revocations of devises of lands, and of personal estate: The first is, an express exclusion of all other manner of revocation; the other is a restriction upon the method of revoking a will of personal estate, by words, or writing, having all other methods existing; the words of the first, are both negative and affirmative, excluding all other manner of revocation, as by accident, &c. He said he could not find any substantial difference between revocations by deed, and by alteration of circumstances; he thought the Statute meant to exclude all parol evidence in every case of revocation, except that necessary one, of the alteration of the attestation of the instrument of revocation, and that the reason of the several cases, why incomplete deeds, as feoffment without livery, bargains and sale without enrolment, release without lease, well put together in Gilbert's Devises, page 93, will operate as a revocation, depends upon this, that wills being ambulatory till the death of the testator, the several informal acts above referred to, countermand, and determine the will; he thought the present case was one within the Statute, and as open to perjury as any other, that is, the dispute concerning the reality of a subsequent marriage, the legitimacy of the children, and that the Statute meant to have an actual, not a presumptive revocation; that it would let in proof of declarations of the testator, that he intended his will to stand, notwithstanding such alterations of circumstances; that in *Parsons v. Lanoe*, 1 Ves. 189, Lord Hardwicke, C., seemed not well satisfied with the case of *Lugg v. Lugg*, 1 Lord Raymond, 441, that marrying and having children afterwards was a revocation of a will of personal estate; that the case of *Brown v. Thompson*, 1 P. Wms. 304; 1 Eq. Ca. Ab. 413, was taken up without argument. He said, he thought the present bill a reasonable one (but did not state in what particular), and relied on the inadmissibility of parol evidence; that in the only instance where it had been received, that of *Brown v. Thompson*, two great men, Sir John Trevor and Lord Keeper Wright, differed in what such alteration

of circumstances consisted, as appears in 1 P. Wms. 304, in the note, and observed that from that time (which was in 1701) to the present, there was no determination in favor of any such implied revocation; that there was a great deal in the case which spoke to the feelings of humanity, but still courts could not determine from principles of peculiar hardships; it was their duty *jus dicere, non dare*, and so concluded against the plaintiff.

MR. BARON ADAMS. I am of opinion, the alteration in the circumstances of the testator, amounts to an implied revocation; true it is, the testator was married at the time of making his will; but I shall consider that matter, as if he had been then a bachelor.

I hold it as a rule, that wills do not take effect from the time of the execution, but the death of the testator; that till then they are ambulatory.

The doctrine of revocation of wills hath arisen from cases since the Statute of Wills: there can be no revocation, but by express declaration of the testator, or by implication of law; by the latter, by acts done contradictory to, or inconsistent with such wills; upon this principle, that they show the intention, that lands should not pass by such will: even deeds not fully executed, or improperly, as for want of attornment, &c., are a revocation, Rolle's Abridgment, Tit. Devise, fol. 614, 615, not as actual, but implied revocations: so as to inconsistent acts, *Cook v. Bullock*, Cro. Car. 49: so by subsequent acts, though the fee returns to, or remains in the testator, Rolle's Abridg. 660; and *Parsons v. Freeman*, 3 Atkyns, 741. These cases show how the law watches the intention of the testator, that it should continue as before, until his death.

Thus matters stood until the Statute of Frauds: for no provision being made in the Statute of Henry the 8th, concerning revocation, the judges allowed of parol proof, which being inconvenient, that Statute meant to provide against it; but left implied revocations as before.

My learned Brother Perrot thinks this lets in the mischiefs the Statute meant to prevent; I think it doth not; declarations made by a testator lie open to perversion; but in this case, it is not declarations, but facts (as a subsequent marriage, and having children), are to be proved, which are notorious matters.

Before the Statute of Frauds, the will of a single woman marrying afterwards, was held void, 4th Co.; and though there hath been no such determination since the Statute, I doubt not the resolution would be the same.

It must be admitted the Statute is strong, but yet it hath been determined in many cases, that it hath not taken away revocations by implication, *Dister v. Dister*, 3 Levinz, 108; and *Lord Lincoln's Case*, 1 Eq. Cases Abridged, 411; *Sparrow v. Hardcastle*, 3 Atk. 798, and *Eccleston v. Speke*, Carthew Reports, 79. Here the circumstances of the testator are to be considered; when he was without a child he

had left his estate to his nearest relation, his brother ; but when he had a child, it became dependent on him for support : moral duty and natural love called upon him to give it a preference to everybody.

It is therefore a *necessary presumption* that he intended his fortune for the benefit of his child ; and if a bare alteration by an incomplete feoffment, &c., shall be a presumption of a change of intent, shall not marriage, and a child born be a sufficient presumption ?

So it was held in *Brown v. Thompson*, 1 Eq. Ca. Abr. 413 ; and the determination of *Love v. Love*, in the Ecclesiastical Court, whereby marriage and the birth of a child are a revocation of a will of a personal estate, is a foundation for us ; and this opinion is contradicted by no cases.

In *Parsons v. Lanoe*, 1 Ves. 189, there was a child only, without a subsequent marriage. In *Jackson v. Hurlock*, Ambl. 487, before Lord Northington, C., a will was made immediately before marriage, and in contemplation of it.

I will not give any opinion, what would be the consequence of a marriage only, or having a child only, after making a will : but in this case, both marriage and issue happening after the will, I think those alterations of circumstances a revocation of the will.

MR. BARON SMITH said he was of opinion that this was an implied revocation of the will ; that the oldest method of devising was by custom ; next by feoffment to the uses of the last will ; then the Statute of Henry 8th gave a general power ; then came the Statute of Frauds, which let in a testamentary construction.

That at common law a favorable construction is to be put upon the intent of parties ; and in equity, where a man, being *cestui que trust*, having only a daughter, declared that after his death she should have his lands, but had a son afterwards, it was held the son should have the land, as cited in *Shelly's Case*, 1 Co. 100 b. ; which case is also cited with approbation since the Statute of Frauds, in 2 Vern. 416 ; that revocations by operation of law, though not actually, yet were virtually excepted in the Statute of Frauds, as in Levinz, 108, 3 P. Wms. 163 and 170 ; that the danger of perjury lay in allowing of parol proof of *declarations*, not of facts ; and that even under the Statute there must be parol evidence admitted ; as where a will is burned, torn, cancelled, or destroyed, by the testator's directions ; and so concluded for the plaintiff.

LORD CHIEF BARON PARKER agreed with MR. BARON ADAMS and MR. BARON SMITH, and founded himself much on the case cited by MR. BARON SMITH, out of 1 Co. 100 b. and in 2 Vern. 416 ; and in addition mentioned *Roper against Ratcliffe*, in 1712, 2 Eq. Ca. Abr. 771, where a devise to a papist, though incapable of taking, was held a revocation.

And the court declared that a subsequent marriage, and a child born were a revocation of the will, and that the estate descended to the daughter, subject to the wife's dower ; and that the personal estate

was to be divided (agreeably to the determination concerning this will in the Spiritual Court) according to the Statute, and that the plaintiff, the daughter, was entitled to two thirds; and ordered an account accordingly, and directed costs to be paid out of the estate.¹

KENEBEL v. SCRAFTON.

KING'S BENCH. 1802.

[*Reported 2 East, 530.*]

THIS was an issue, directed by the Court of Chancery, to try whether the real estates of James Bradshaw Pierson were well devised by his will, dated 28th Jan., 1795. On the trial before *Lord Kenyon*, C. J., at the sittings after last Trinity Term, a verdict was found for the plaintiff, subject to the opinion of this court on the above question.

J. B. Pierson, by will duly executed and attested, dated 28th January, 1795, after directing payment of his debts, devised as follows: "As to all my freehold, copyhold, real and personal estates of which I am possessed or entitled to at the time of my decease, my copyhold estate in the manor of Kennington having been by me surrendered or intended so to be to the use of this my will, I give, devise, and bequeath the same to M. Scrafton, to have and to hold the same real and personal estates, &c., to the said M. S., his heirs, &c., upon the several uses, trusts, &c., hereinafter mentioned, viz., I give all my personal estate,

¹ In *Doe d. Lancashire v. Lancashire*, 5 T. R. 49 (1792), the doctrine was extended to the case of a posthumous child.

"We all know now, that a will is revoked by a subsequent marriage and the birth of a child. I believe, they do go the length of permitting evidence to be received against that. I do not like that; and Lord Kenyon in the last case, *Lancashire v. Lancashire*, 5 Term Rep. B. R. 49, did not form his opinion upon it. The circumstances themselves should be held to be an ademption, independent of any particular knowledge the testator might have. I think that the very circumstance of a wife and child infers a presumption, that the will shall not stand. This has been followed in courts of law, and in the famous case of *Christopher v. Christopher* (in the Court of Exchequer, July 6th, 1771. See Dougl. 35; 4 Burr. 2171, 2182); in which there was a difference of opinion upon the bench; and a very learned judgment was given by Baron Perrot against the opinion of the other barons. Only for that majority I should have held with Baron Perrot; for the decision was very strong upon the Statute of Frauds. But such a case as this has never yet been decided: the birth of children by the first wife after the execution of the will, and after the death of the wife a subsequent marriage and no children by that. I do not say, it will have the same effect. I am not the judge to decide that. But there is not a single argument applying to the feelings of mankind to draw a decision from the court, that will not apply to the one case as much as the other. Conviction flashes on every man's mind, that there is just as much presumption. Why are these subsequent children less dear to him, because he happened to have other children born before? I think, the same argument would do under the circumstances." — *Per* SIR RICHARD PEPPER ARDEN, in *Gibbons v. Caunt*, 4 Ves. 840, 848 (1799).

In *Emerson v. Boville*, 1 Phillim. 342 (1802), it was held that a will revoked by marriage and the birth of a child was not revived by the death of the child. Cf. *Wright v. Sarmuda*, 2 Phillim. 266, note (1793).

whatsoever and wheresoever, &c., to my dearly beloved Mary Ann Simpson, one of the daughters of J. Simpson, &c., for her sole use and benefit forever; and I will, that out of the rents, &c., of my said freehold and copyhold estates, or by mortgage, &c., my said trustee M. S. shall pay unto the said M. A. Simpson an annuity of £150 for her life: *and in case I shall have any child or children by her*, who shall be living at my decease, then I order that my said trustee, out of the rents and profits of my said freehold and copyhold estates, or by mortgage, &c., do pay for the maintenance and education of each such child, £60 until their respective age or ages of twenty-one years; and on that event happening, I order my said trustee to levy and raise £3,000 and pay the same unto and amongst my said children by M. A. Simpson, share and share alike; and if but one such child, the whole of the said £3,000 to be paid to such surviving or only child, his executors, &c. And as to all and singular my said freehold and copyhold estates, &c. (subject to the annuities and payments aforesaid, and also subject to the legacy of £100 hereinafter mentioned), I give, devise, and bequeath the same to the use of my father J. B. Pierson, my half-brother by blood V. Pierson, my half-brother by blood A. Pierson, and my half-sister by blood W. Pierson, their several and respective heirs, &c., in equal shares, to have and to hold the same to them and their heirs, &c., forever, as tenants in common, and not as joint tenants. I give and bequeath to my said trustee and executor M. S. the said £100, &c." (Then follows a power to him to retain for his charges in executing the trusts, &c., of the will.) "And as to all the rest and residue of my real and personal estates not before specifically devised, I give, devise, and bequeath the same to the said M. S., his heirs, &c., upon the several trusts, &c., and for the several uses, &c., and charged as before mentioned;" and then he constituted the said M. S. sole executor, &c.

The testator, on the 29th of August, 1795, intermarried with the said Mary Ann Simpson in the will mentioned (now Jennings, one of the defendants). After their marriage, he had three children by her, viz., the defendants, M. Pierson, W. Pierson, and A. M. Pierson, who was born six months after the testator's death, and since deceased. At the time of making his will, the testator had one male child living, by M. A. Simpson, who died on the 9th of June, 1795, before the marriage. On the 19th of July, 1798, the testator died without altering or expressly revoking his will, leaving the defendant M. A. Pierson, his widow, now Jennings, and the defendants, M. Pierson and W. Pierson, his two children him surviving; and which children, together with their deceased sister, A. M. Pierson, upon her birth, became and were co-heiresses at law, and also the customary heir of the said testator, as to the copyhold estate of the said testator, in the manor of Kennington, in the will mentioned, and which was duly surrendered to the uses of the will. About five months before the testator's death, in conversation with his wife, in the presence and hearing of Joseph Simpson, her father,

upon her requesting him to alter her maiden name, as it then stood in his will, to her married name of Pierson, the testator said *it was not of any consequence ; for that he had consulted a professional gentleman, who told him that the will, as it then stood, was a good and sufficient will ; and observed, he had thereby amply provided for her and her children :* and a short time before his death, in another conversation, in the presence and hearing of Edward Young, relative to the testator's late solicitor's bill of costs, wherein was charged five guineas for making his will, he, the testator, observed, *that he thought it a very exorbitant charge ; for that he himself copied the will.* The will and duplicate thereof are in the testator's own handwriting. The testator, at the time of his death, was indebted to divers persons, as well by simple contract as otherwise, to a very considerable amount ; and which debts are yet due and unpaid. The testator died seised of no freehold estate ; but was, at the time of making his said will, and also at his decease, seised as of fee at the will of the lord, according to the custom of the manor of Kennington, of the copyhold estate in the will mentioned, holden of the manor, of a considerable annual value. The testator's personal property being small, and very insufficient for the payment of his debts, which were of great amount, the plaintiff, a creditor, filed his bill in the Court of Chancery, on behalf of himself and the other creditors of the testator, against M. S. the executor, and the other parties claiming interest in the real and copyhold estate, devised by the will under the disposition thereby for the usual accounts and administration of the personal assets, towards discharge of the testator's debts, and to have the deficiency raised by sale or mortgage of the real and copyhold estates under the charge made by the will for that purpose. The case was argued in Easter Term last.

Barrow, for the plaintiff.

R. Smith, contra.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., now delivered the judgment of the court. After stating the case, and the 6th section of the Statute of Frauds (29 Car. 2, c. 3), which enacts that "no devise in writing of lands, &c., nor any clause thereof, shall at any time after, &c., be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, in his presence, and by his directions and consent," &c., he proceeded thus :—

The difficulty of reconciling the doctrine of implied or presumptive revocations of a will of lands, with the express provisions of that section, was originally very considerable. This point, however, namely, that such revocations are not excluded by the Statute of Frauds, has been considered as settled ever since the case of *Christopher v. Christopher*, in the Exchequer in 1771 ; by which revocation of wills (implied not only from contradictory acts inconsistent with the existence of the

will, and its operation upon the property devised, as feoffments made or recoveries suffered of the lands devised, though to the same uses as before; and bargain and sale, though without enrolment) have been sustained: but revocations have been also holden to be necessarily implied or presumed from so material a change in the circumstances of the testator as is occasioned by subsequent marriage and the birth of a child. The doctrine of implied revocations, originally borrowed from the civil law, and applied to bequests of personal estate (as in the case of *Overbury v. Overbury*, 2 Show. 242, and *Lugg v. Lugg*, 1 Lord Raym. 441, and Salk. 592) has been since denied in some degree by the Court of Common Pleas in *Driver v. Standring*, 2 Wils. 90, and much doubted by Lord Hardwicke in *Parsons v. Lanoe*, 1 Ves. 191, in its application to devises of land. That it is however applicable to devises of land has been so solemnly settled upon argument in the case already mentioned of *Christopher v. Christopher* in the Exchequer in 1771, and has been since so frequently recognized in different courts at various times; as for instance, at the Cockpit in *Spragg v. Stone* in 1773; in the King's Bench, in the cases of *Brady v. Cubit*, Dougl. 31, and of *Doe v. Lancashire*, 5 Term Rep. 49; and upon many other occasions, that it must now be considered as a general proposition of law, that marriage and the birth of a child, *without provision made for the objects of these relations*, of themselves operate a revocation of a will of lands. The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason as it is put by Lord Kenyon in *Doe v. Lancashire*, 5 Term Rep. 58, namely, as being "a tacit condition annexed to the will" when made, that it should not take effect if there should be a total change in the situation of the testator's family, than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply (and upon this subject particularly, after what was said by Lord Mansfield in *Brady v. Cubit*, Dougl. 39) only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case where the same persons, who after the making of the will stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination. There is not, therefore, in this case, that total change in the situation of the family, and that total destitution of provision for those who ought to be the objects of the testator's care and protection (although the provision be made for them under a different character) which can vacate the will on the ground of a supposed tacit condition, that it should be void upon a total change in the situation of the testator's family, and a total want

of provision for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. Indeed, it is not very easy to comprehend the legal effect of *an intention to revoke*, unless manifested and carried into execution by some act *in pais*. It is certainly true, that the law is not as favorable to bastards, not *in esse*, as it is to legitimate children. In a variety of cases it will not raise an use in their favor, in consideration of blood, upon a covenant to stand seised to uses: nor will the want of a surrender of copyhold to the use of a will be supplied in favor of a natural child: nor can such child properly take by the description of issue. And in other cases also, from uncertainty in the terms of description of and reference to its *parents*, a bastard is prevented from taking at all. As however in this case the children were, at the time when the will speaks, viz., at the death of the testator, born and legitimate, no question of defective description arising out of the words, "*in case I shall have any child or children by her*," can be made; nor was the policy of the law, respecting marriage, eventually contravened in this case (upon which point, the case in Cro. Eliz. 510, proceeds); inasmuch as the children who now claim under the will were not unborn bastards, but born and legitimate at the death of the testator. After what has been said already, and that the will in question is not under these circumstances vacated, on the ground of any tacit condition annexed to the will at the time of its making, nor on the ground of any intention to revoke, to be presumed in favor of a wife and child or children unprovided for (the fact upon which such presumption could be formed not existing in the present case) it becomes unnecessary to consider whether the revocation generally holden to arise from subsequent marriage and the birth of a child, without provision made for the objects of these relations, can be *rebutted by parol declarations* in favor of the will. It is enough to say that if a revocation, which would otherwise be implied, can be so rebutted, it is rebutted in the present instance: for it is stated that about five months before the testator's death, in a conversation with his wife in the presence and hearing of Joseph Simpson, her father, upon her requesting him (the testator) to alter her maiden name, as it then stood in his will, to her then married name of Pierson, he said, *that it was not of any consequence; for that he had consulted a professional gentleman, who had told him that the will as it then stood, was a good and sufficient will; and observed, that he had thereby amply provided for her and her children*. Upon the whole, therefore, if there be any question which at this time of day can be agitated with effect, whether implied revocations of wills of land can be allowed at all consistently with the Statute of Frauds, our decision leaves even that question untouched; inasmuch as we sustain the will as yet in force, and unrevoked by any implication whatsoever. Neither does our decision clash with the doctrine of a tacit condition annexed to the will, viz., that it should be void in the event of a marriage and children *without provision*; inasmuch as that

condition, viz., of marriage and of the birth of children unprovided for, has not taken effect in this instance. And the question, How far implied revocations are competent to be rebutted by the parol declarations of the testator? is also left untouched, for the reason before given. Therefore, without impugning any one decision upon the subject, and in conformity with them all, upon whatever various grounds they may have proceeded, we feel ourselves warranted in considering this will, made in favor of those who at the time of the testator's death had become his wife and children, as in full force, and not revoked under the circumstances stated in this case.

*Postea to the plaintiff.*¹

EX PARTE ILCHESTER.

CHANCERY. 1803.

[*Reported 7 Ves. 348.*]

THE late Earl of Ilchester² in 1778, being married but not then having children, made his will, by which he appointed his wife guardian of all her daughters, and his wife and brother guardians of all her sons. Lady Ilchester died in 1790, leaving a son and several daughters. In 1794 Lord Ilchester married Maria Digby, and, by virtue of a power which he had over certain property settled by him on his first marriage, he appointed £500 a year in favor of his second wife. There was a

¹ "The case of *Kenebel v. Scrafton* had for a considerable time very great weight with me upon this question. The point immediately before the court was, whether the will of that testator, who was an unmarried man, was revoked by his marriage and the subsequent birth of children. The opinion of the court, consistently with former authorities, was that as marriage alone will not revoke a will, though connected with the birth of a child it will, yet those two circumstances would not have that effect; the will containing a provision for children, if the testator should have any.

"Upon what can be collected from what was said by the court and from the argument, there was nothing upon the face of that will, raising a necessary implication, that legitimate children were not to take; or that legitimate and illegitimate children could not take together, as it has been argued here, under the same description. It would be very difficult to make out, that they can so take: but that was not a difficulty, with which the court had to contend in that case. If the court had thought, that those words meant illegitimate children, the necessary effect of the subsequent birth of children would have been, that the will would have been revoked. We may conjecture, that he meant illegitimate children, if he did not marry: yet notwithstanding that may be conjectured, the opinion of the court was, as mine is, that where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and her children, he must be considered as intending legitimate children; as there is not enough upon the will itself to show, that he meant illegitimate children; and my opinion is, that such intention must appear by necessary implication upon the will itself." — *Per* LORD ELDON, C., in *Wilkinson v. Adam*, 1 Ves. & B. 422, 465 (1813).

² The following statement is substituted for that in the report, and only so much of the case as relates to revocation by marriage and the birth of issue is given.

provision in the settlement for the children of this marriage. There were two sons of the second marriage. Lord Ilchester died in 1802.

On a petition for the appointment of guardians for the testator's children, one of the questions was whether the will of 1778 was revoked by the subsequent marriage and birth of issue.

Mr. Romilly and *Mr. Newbolt*, in support of the petition.

Mr. Richards and *Mr. Fonblanque*, against the petition.

LORD ELDON, C., asked the assistance of SIR WILLIAM GRANT, Master of the Rolls, and LORD ALVANLEY, Chief Justice of the Court of Common Pleas.

THE LORD CHANCELLOR [ELDON]. If the points upon this petition had been confined to that, which arises upon the second marriage and the birth of children by that marriage, under the circumstances, in which that marriage and the birth of those children took place in this particular case, notwithstanding that question must have been determined, not merely with respect to this matter of guardianship, but must have had relation to, and effect upon, the property of this family, which I take to be considerable, I should not have been justified in giving the Master of the Rolls and the Lord Chief Justice the trouble of attending upon that point; for I had no considerable doubt at first, nor has that been increased since, that the second marriage and the birth of children by that marriage should not under all the circumstances be taken to be a revocation. My opinion is, it ought not to be so considered. I am happy to find, the Master of the Rolls and the Lord Chief Justice concur with me upon that; and, without stating any opinion upon the cases that have been cited, I may state the sentiments of us all to be, that, where a testator stands in the circumstances, which appear in this case, with regard to the children of the prior marriage, and the circumstances, in which he placed himself, as to the children of the second marriage, this case forms a case of exception. I do not go farther; for it is too obvious from what has since passed, that from the rule, originally adopted and now settled, whether to be considered a rule of law or a presumption, whether going upon the intention or an implied condition, those difficulties have arisen, which some judicial persons, one in particular, foresaw. I think it better therefore to confine the opinion in these terms; that under all the circumstances of this case, this appointment is not revoked by the subsequent marriage and birth of children.

DOE d. WHITE v. BARFORD.

KING'S BENCH. 1815.

[Reported 4 M. & S. 10.]

AT the trial of this ejectment, before *Heath, J.*, at the last Cambridge-shire Assizes, the case was this:—

The plaintiff claimed under the will of one J. Bonteel, who, being seised in fee in 1791, married, and in 1792 made his will, and devised the premises in question to his niece, from whom the plaintiff derived title. J. B. died leaving his wife enseint, which was unknown to either of them at the time of his death, and afterwards the wife was delivered of a daughter, from whom, as heir at law, the defendants derived title. And the question was, Whether this alteration of circumstances was an implied revocation of the will. The learned judge ruled that it was not, and there was a verdict for the plaintiff.

Blosset, Serjeant, moved for a nonsuit.

LORD ELLENBOROUGH, C. J. The argument seems to be, that because the testator, had he known his situation, ought to have revoked his will, therefore the law will impliedly revoke it. But if it is to be understood that every will is made upon a tacit condition that it shall stand revoked whenever the testator by the circumstance of the birth of a child becomes morally bound to provide for it, I do not see why the birth of any one of a numerous succession of children would not equally work a revocation. But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent? Marriage, indeed, and the having of children, where both those circumstances have concurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient. I remember a case some years ago, of a sailor who made his will in favor of a woman with whom he cohabited, and afterwards went to the West Indies and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation. In *Doe v. Lancashire*, 5 T. R. 49, it was adjudged that marriage and the pregnancy of the wife with the knowledge of the husband, and the subsequent birth of a posthumous child, came within the rule, the same as if the child had been born during the parent's life. In this case it is desired of us to extend the rule a step farther, but I own I am afraid of so doing.

LE BLANC, J. Lord Kenyon considered the rule as founded upon a tacit condition annexed to the will, that if the party should marry and have a child it should not take effect.

Rule refused.

MARSTON v. ROE d. FOX.

EXCHEQUER CHAMBER. 1838.

[Reported 8 A. & E. 14.]

THIS case was brought by three writs of error from the Court of Queen's Bench, where judgment had been given for the lessor of the plaintiff on a special verdict. The plaintiff below brought ejectment to recover certain lands in Staffordshire, the trial of which action was removed, by a suggestion on the record, to Gloucester, where it took place before *Alderson*, B., at the Spring Assizes, 1836. Upon the trial, cross bills of exceptions were tendered to, and allowed by, the learned judge,—that on the part of the lessor of the plaintiff containing exceptions, as well against admissions of evidence given by the defendant below, as also for the rejection of evidence which he had offered; that on the part of the defendant below for the rejection of evidence only. One of the writs of error was sued out by the defendant below to bring up the judgment which was given for the plaintiff, without argument, on the special verdict; and each party brought up his own bill of exceptions by a writ of error sued out by himself.

The jury found for the plaintiff as to the premises stated in the declaration to have been demised by William Halton. And, as to the residue of the premises, alleged to have been demised by W. J. Fox, they found a special verdict. The verdict stated, —

That on January 17th, 1835, John Fox made his last will, duly executed, &c., and thereby devised as follows: "I give and devise," &c. (specifying certain messuages and lands), "unto and to the use of my friend, Anne Bakewell, of Uttoxeter aforesaid, spinster, and her assigns, for and during the term of her natural life, or so long thereof as she shall remain sole and unmarried, subject, nevertheless, to impeachment of waste; and, from and after the decease or marriage of the said Anne Bakewell, which shall first happen, I give and devise the said messuages, dwelling-houses or tenements, buildings, yards, gardens, farms, lands and hereditaments, with the appurtenances, to my relation, William Marston, of Manchester, in the county palatine of Lancaster, cork merchant, his heirs and assigns forever. And" (after some further devises, not material here, to relations and others) "I give, devise and bequeath all my messuages, farms, lands, tenements, tithes, rents, hereditaments and real estate, and parts and shares of such (not hereinbefore given, devised, and disposed of), wheresoever situate in Great Britain, and whether freehold, copyhold or customary, and whether in possession, reversion, remainder, contingency or expectancy, with all rights, members and appurtenances thereto respectively belonging; and also all my moneys, securities for money, goods, cattle, chattels, rights, credits, effects and personal estate whatsoever and wheresoever, and of what nature, kind or quality soever, unto the said William Marston, his heirs, executors, administrators and assigns

forever, according to the respective natures and tenures thereof; nevertheless subject" to debts, etc.

That from March 25th, 1834, down to the time when he executed the said will, the testator contemplated a marriage with the said Anne Bakewell. That he married her on February 21st, 1835, and lived with her until the time of his death. That from the time of his marriage until his death he was in a bad state of health; and that on May 11th, 1835, he was taken ill, and died in about two hours. And that at the time of his death he was seised in fee-simple in possession of the residue of the hereditaments and premises mentioned in the will, and demised by the said William John Fox.

That the said will was, in a short time after the death of the said John Fox, found in his bed-room in an oak chest of which he had kept the key; and that Elizabeth Stone, the person who had found the will, had been told by the testator, ten weeks before his death, where he had deposited his will.

That, on the 16th October, 1835, the said wife of John Fox was delivered of the said William John Fox, one of the lessors of the plaintiff, who is the only son and heir at law of the said John Fox.

That the said John Fox was seised in fee of certain lands, tenements, and hereditaments, and continued so seised until the time of his death, out of which lands, tenements, and hereditaments his widow would be entitled to dower, unless she was deprived thereof by the operation of his will, or by operation of law.

That the testator, on 20th November, 1834, had agreed to purchase a house for £690, for the purpose of residing in it when married. That in the draft of conveyance sent to the testator for his perusal was inserted a declaration that "any wife testator might take should not be entitled to dower." That testator requested that such clause should be struck out; and that, upon its being explained to him as he was on the point of marriage, that, if, after he was married, he wished to resell the property, he could not do so without the consent of his wife, he said he was perfectly aware of that, and that he did not intend to debar his wife of dower.

That, on the 30th September, 1829, Joseph Fox, the brother of the said John Fox, entered into a written contract for the purchase of some property at Marston Montgomery, in the county of Derby, at the sum of £463 14s. 6d., with Thomas Harrison and others, trustees under the will of John Etches, deceased. That, on 25th March following, the said John Fox was let into possession of the last-mentioned premises; but, the titles not being then complete, it was agreed that he should receive the rents and profits from that period, and should pay interest to the said trustees on the purchase-money, until the purchase was completed.

That, after this agreement, the said John Fox, in like manner as the purchasers of other parts of the same estate, which was sold in lots, was let into possession of the property so contracted for by the said

Joseph Fox, and let the same to John Deaville, who held the same as tenant, and paid rent half-yearly to John Fox, from the said 25th of March, 1830, until the time of his decease, some of which payments were made in the presence of his brother Joseph. That no other contract than the one before mentioned to have been entered into, by the said Joseph Fox with the said Thomas Harrison and others, was made for the sale of the said last-mentioned property.

That, on 17th November, 1834, the said Joseph Fox died unmarried and intestate, seised of considerable real estates in fee simple in possession, which thereupon descended to the said John Fox, as his only brother and heir at law; and that John Fox was the sole next of kin of Joseph Fox, and entitled to administration of the personal estate of which he died possessed.

That by lease and release, bearing date 6th and 7th March, 1835, the said property at Marston Montgomery was conveyed by the surviving trustees under John Etches's will to the said John Fox, in consideration of £463 14s. 6d., and he thereupon paid the said purchase-money, and interest thereupon from 25th March, 1830.

That, in August, 1835, the said John Deaville paid half a year's rent, due for the same premises on the 25th March preceding, to John Hordern, who was one of the executors of the said John Fox.

That the value of the real estate left by the said John Fox amounts to about £49,000.

Error was assigned upon the judgment in the common form; and the plaintiff below joined in error.

The plaintiff below (the defendant in error), in his bill of exceptions, stated that the defendant below, on the trial, admitted the title of W. J. Fox as heir at law, and consented to a verdict for the plaintiff below as to the premises stated to have been demised by W. Halton; but that, as to the residue of the premises, he insisted on his own title as devisee under the will of John Fox, dated January 17th, 1835. The plaintiff below then stated the following grounds of exception.

First, that the defendant below (before putting in the will of January, 1835), offered in evidence a will of John Fox, dated March 25th, 1834, in which he bequeathed to William Marston (the defendant below) and another, for the life of Anne Bakewell, an annuity of £40, upon trust to pay the same to her, and not to any husband or assignee, &c.; and he made the annuity payable out of the rents of certain lands, which he bequeathed to the trustees for the term of ninety-nine years (if Anne Bakewell should so long live) for that purpose; and, subject to the above bequests, he devised all his estates, lands, &c., and personalty, to his brother, Joseph Fox, his heirs, executors, &c., forever. That the defendant below likewise offered in evidence a will of John Fox, dated December 1st, 1834, whereby he devised certain messuages and lands to Anne Bakewell for her life, and from and after her decease to the said William Marston in fee; he also bequeathed certain legacies; and, subject, &c., he left all the residue of his real and personal estates

to W. Marston, the defendant below, his heirs, executors, &c., forever ; and he appointed W. Marston and another his executors. That the counsel for the plaintiff below objected to the admission of these wills of 1834, but that the learned judge received them, whereupon the plaintiff's counsel excepted, &c.

The second ground of exception was the admission in evidence of John Fox's declaration, under the circumstances stated in the special verdict, that he did not intend to debar his wife of dower. The bill of exceptions stated this evidence to have been objected to at the trial, on behalf of the plaintiff below, but received ; whereupon, &c

Thirdly, the bill of exceptions stated that the plaintiff below, at the trial, proved the contract entered into by Joseph Fox with Harrison and others, for the purchase of property at Marston Montgomery, as stated in the special verdict ; and it set out the contract as follows : " Joseph Fox, of Uttoxeter, in the county of Stafford, tanner, doth hereby acknowledge himself to be the highest bidder for the purchase of the premises described in the annexed particulars, in lots 2 and 3, under the above conditions, at the price or sum of," &c. ; " and he hereby agrees to pay the said purchase-moneys pursuant to these conditions, and in all other respects to be bound by and perform the same ; and the vendors " (naming them) " do hereby agree to sell the said tenements and premises mentioned in this contract, to the said Joseph Fox, under the above conditions, at the prices aforesaid. Dated the 30th day of September, 1829. JOSEPH FOX, BENJAMIN CARNELL, THOMAS CARNELL." Then followed a specification of the lots. The bill then stated, as in the special verdict, the facts proved, from the letting of John Fox into possession to the payment of rent by Dea-ville. It then proceeded : " And the counsel for the said Richard Roe, further to prove the said issue on his part, and for the purpose of showing that it was the said John Fox who entered into the said contract for the purchase of the said premises at Marston Montgomery, and that the said Joseph Fox was the agent for the said John Fox in that behalf, and had signed the contract as such agent, then and there tendered and proposed to give parol evidence that, on the 30th day of September, 1829, the said Joseph Fox (the brother of the said John Fox) was appointed by the said John Fox his agent, for the purpose of making the agreement aforesaid for the purchase of the said premises ; and that, in consequence of such appointment, the said Joseph Fox did, in his own name, but as such agent as aforesaid and on behalf of the said John Fox, sign the said agreement ; and that both the said Joseph Fox and John Fox, in the year 1830, within three months after the said agreement was so signed as aforesaid by the said Joseph Fox, gave instructions to one James Blair, the attorney who prepared the deed of conveyance of the same hereditaments and premises, that the same should be conveyed to the said John Fox, and not to the said Joseph Fox ; and that the same were so conveyed accordingly." And the bill of exceptions stated that this evidence was objected to by the

counsel for the defendant below, and that the learned judge rejected it; whereupon, &c.

The plaintiff below assigned for error that the evidence objected to by him "ought not," and that the evidence tendered by him as above mentioned "ought to have been admitted and allowed." The defendant below joined in error.

The defendant below, in his bill of exceptions, stated that it was admitted, on the trial, that the testator contemplated marriage when he made his will of January 17th, 1835. That the counsel for the defendant below offered in evidence certain letters of the testator to him, which were set out, written subsequently to the will, and expressing much kindness to the defendant. Also a letter written to the defendant, after the marriage, announcing it, but stating that no act of the testator's should ever prejudice the interest of relatives, and subscribed, "Your truly sincere and affectionate cousin, JOHN FOX." Also a verbal declaration of the testator, a week or ten days before his death, that he had made his will and that he would not alter it, as it was, so it should stand; that he had left the chief part of his property to his friend, Mr. William Marston; and that he had taken care the Bakewells should not have any part of his property; and other expressions to a similar effect between the marriage and death of the testator. Also a statement by him, about a month before his marriage, that he was going to be married to Anne Bakewell; that he had made his will; that he had left her a very handsome fortune, whether he married her or not; and that he had left Mr. Marston the biggest bulk of his property, by the wish of his brother: and other declarations, both before and after the marriage, importing that his property would fall into the hands of Marston, the defendant below.

The bill of exceptions then stated that the counsel for the plaintiff below objected to the reception of these letters and declarations, and the learned judge excluded them; whereupon, &c.

The defendant below assigned for error that the evidence "ought to have been admitted and allowed, to entitle the said defendant to a verdict." Joinder.

An action of trover for the title-deeds of the same estate had been brought by the lessor of the plaintiff against the defendant below in the Court of Exchequer, and came on for trial before *Alderson*, B., at the same assizes; and, as the same question arose in both actions, a course precisely similar was pursued in both; and, for the purpose of avoiding as well unnecessary expense to the parties as loss of time to the respective courts of error, it was thought convenient that the argument of the writs of error in the first-mentioned cause should take place in the presence of all the judges of the three courts of Westminster Hall, the parties having consented that both cases should abide the decision of the present.

This case was argued June 13th and November 1st and 27th, 1837, before TINDAL, C. J., LORD ABINGER, C. B., LITLEDALE, PATTESON,

WILLIAMS, COLERIDGE, PARK, BOSANQUET, VAUGHAN, and COLTMAN, JJ., and PARKE, BOLLAND, ALDERSON, and GURNEY, BB.

Sir J. Campbell, Attorney-General, for the plaintiff in error (the defendant below).

Sir W. W. Follett for the defendant in error (the plaintiff below).

Cur. adv. vult.

TINDAL, C. J., in this term (January 26th) delivered the judgment of the court. After stating the manner in which the writs of error came before the court, his Lordship proceeded. This case has accordingly been argued in the presence of all the judges of England, with the exception of Lord Denman.

On the part of the plaintiff in error (the defendant below), it was contended that, admitting the general rule to be established, that marriage and the birth of a child operated as the revocation of a will made before the marriage, where the wife and child were left without provision, yet such revocation was grounded on an implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will made, and upon such implied intention only, and consequently that any evidence was admissible on the part of the devisee which showed a contrary intention, in order to rebut such presumption.

On the part of the defendant in error it was contended that such revocation, under the circumstances above supposed, is the consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that, when the state of circumstances under which the will is made becomes so materially, or rather entirely, altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator. The broad question, therefore, which has been argued between the parties has been, whether evidence of the testator's intention that his will should not be revoked is admissible to rebut the presumption of law that such revocation should take place? And we all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently that no such evidence is admissible. The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases, as well in the ecclesiastical courts as in the courts of common law. With respect to the former we cannot but entertain considerable doubt whether their authority can be held to apply to the present question. For, whilst we are entirely convinced of the importance of an uniformity of decision between the courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation, or the same principle of law is under discussion in each; and entertaining, as we do, at the same time, the highest respect for the learning

and ability of those by whom justice is administered in the ecclesiastical courts, we cannot forget that in the question now before us *we* have to deal with the provisions of a Statute with which the questions ordinarily coming before *them* are wholly unincumbered. The question now before us relates to the revocation or non-revocation of a will *devising real property*; it is a question whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The ecclesiastical courts, on the other hand, are concerned in the granting probate of wills and testamentary papers, *relating to personality only*, in which cases no statutory enactment has excluded parol evidence of the intention of the testator as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on those points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions, therefore, in the ecclesiastical courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And, if that question is to be decided, as we think it is, by the weight of the authorities to be found in the courts of common law, the balance preponderates greatly in favor of the proposition that no evidence of intention is to be admitted to rebut the presumption of law that a will is revoked by subsequent marriage and the birth of a child. The cases relied upon principally by the plaintiff in error (the defendant below) are those of *Brady, lessee of Norris, v. Cubitt*, 1 Doug. 31, and *Kenebel v. Scrafton*, 2 East, 530; those which are appealed to by the defendant in error (the lessor of the plaintiff) are *Doe dem. Lancashire v. Lancashire*, 5 T. R. 49, and *Goodtitle dem. Holford v. Otway*, 2 H. Bl. 516. Now, with respect to the case of *Brady, lessee of Norris, v. Cubitt*, it must be admitted that the opinion of Lord Mansfield is expressed in terms the most explicit and unreserved, that the presumption of revocation from marriage and the birth of children, like all other presumptions, "may be rebutted by every sort of evidence." But it must, at the same time, be observed that the decision of that case rests also upon other grounds, which are altogether satisfactory and free from objection; viz., first, that the disposition made by the will was of *part only*, not *the whole* of the estate; and, secondly, that the instrument executed after the birth of the child operated *as a republication* of the devise contained in the will. And, as to the case of *Kenebel v. Scrafton*, it affords no authority whatever for the position that such implied revocation can be rebutted by parol evidence of a contrary intention existing in the testator's mind, because, in that case, the objects of the marriage were contemplated and provided for by the

will, so that there was no implied revocation whatever of the will ; and, next, because the question as to the admissibility of such evidence is expressly declared by Lord Ellenborough, in giving the judgment of the court, to be left entirely untouched by the decision of that case.

And, looking, on the other hand, at the cases relied upon on the part of the lessor of the plaintiff, we agree entirely with Lord Kenyon as to the ground upon which the doctrine of implied revocation, under the circumstances now before us, ought to be rested. That very learned judge, in giving his judgment in the case of *Doe dem. Lancashire v. Lancashire*, 5 T. R. 58, 59, treats it as a principle of law, of which he suggests the foundation to be a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family ; and this foundation of the rule is confirmed by the judgment of Lord Ellenborough in the case above referred to (2 East, 541), where he says this ground is to be preferred to "any presumed alteration of intention ; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon." The case, again, of *Goodtitle dem. Holford v. Otway*, although not the same in circumstances, yet establishes the very same principle as that contended for by the defendant in error. That case did not indeed relate to the revocation of a will by subsequent marriage and the birth of a child, but to revocation of a will by a subsequent conveyance of lease and release executed for a limited purpose only. But the same principle was laid down, that parol evidence shall not be admitted to show that the testator meant his will to remain in force against the revocation implied by law from the execution of such subsequent conveyance, the Lord Chief Justice Eyre stating his opinion to be, "that, in cases of revocation by operation of law," "the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent, that it does not admit of circumstances to be set up in evidence to repel it. And this makes it difficult," he says, "to understand the case in Douglas (*Brady, lessee of Norris, v. Cubitt*), supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds."

And we think this opinion, at which we have arrived, not only supported by the authority of the decided cases, but the only one which is consistent with the provisions of the Statute of Frauds. For, if, against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator leading to the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator leading to a different inference, and of declarations contradictory to the former. And, again, the admission of

such evidence leads to this further difficulty, that, if the testator changes his first intention, and adopts a contrary one, which of the two intentions is to prevail? Is it to be the first, which is clearly expressed and proved, or is the latest formed intention, like the last will, to be allowed to predominate? It was precisely to preserve us from the perplexity and uncertainty of such conflicting evidence, both in the making and revoking of wills, that some of the provisions of the Statute of Frauds were expressly framed. We think, therefore, such evidence was inadmissible; and that the rejection of it, when offered by the plaintiff in error (the defendant below), was right; and that the bill of exceptions, tendered upon that ground by the defendant below, and allowed by the learned judge, has entirely failed.

But the plaintiff in error contends that the rule of law, to which we have adverted, does not apply to the case before us. It becomes necessary, therefore, to determine what is the precise rule of law upon this subject, and to consider the objections urged against its application to the present case. And, upon a careful examination of the several cases which have been decided on this point, we take the rule of law, so far as it is material to the present inquiry, to be this; that, in the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation.

Now, with respect to the rule so laid down, the plaintiff in error objects that the exception to it is not confined to the single case where a provision is made by the will for the children of the marriage, but that the case is also excepted in which a provision is made by the will for either the wife, or the children; and, still further, he contends that, if it is necessary that provision should be made for both wife *and* children, it is enough that it is made either by the will itself or any subsequent provision; and that, upon the facts of this case, it appears a provision is made for both in the one way or the other; and that the estate, which was conveyed to the testator after the making of his will, being an after-purchased estate, did not pass thereby, but descended to the child of the marriage as his heir at law, and thereby formed such a provision for him.

With respect to the first objection, we are all of opinion that, under the circumstances above supposed, in order to prevent the revocation of the will, and to take the case out of the general rule, it is not sufficient that a provision is made for the *wife only*, but that such provision must also extend to the children of the marriage.

The children of the marriage, both in the consideration of our law, and of the civil law, from which the rule itself has been adopted, are the subjects of the marked anxiety of both codes of law. This is evident from the preamble to the Statute of Wills, 32 H. 8, c. 1, which recites, as the object of the Statute, the enabling the king's subjects to

further "the good education and bringing up of their lawful generations," and "to discharge their debts, and, after their degrees set forth, advance their children;" and, still further, the observation of Lord Chancellor Nottingham, in the case of *Pitt v. Pelham and Another*, Freeman's Rep. ch. 134, is direct upon the point: "The ground of the Statute of Wills, 32 H. 8, is the good of children and posterity." And no case has been decided, in which the will has been held to be not revoked, where the courts have not acted on the principle that the provision was not made for the wife only, but extended to the children also. In the case of *Eyre v. Eyre*, cited in 1 Peere Williams, 304, the will appears to have been held to be revoked upon the ground that no provision is made for the child. And the case of *Brown v. Thompson*, 1 Eq. Cas. Abr. 413, pl. 15 (s. c. 1 P. Wms. 304, note †, 6th ed.), which at first seems to lead to a contrary conclusion, does in fact support the principle now laid down. In that case, the testator had devised an estate to the woman whom he afterwards married; and *her heirs*; and Sir John Trevor, M. R., held the will to be revoked by the subsequent marriage and the birth of a child; which must necessarily have been on the ground that no provision was made for *the child*; and, although this decree was afterwards reversed by the Lord Keeper Wright, yet such reversal (the propriety of which seems very doubtful) expressly recognizes the principle that the children of the marriage must be provided for by the will; for he assigns, as the reason for the reversal, that "no injury is done any person; and those are provided for, whom the testator was most bound to provide for," meaning thereby that the child was to be considered as provided for, by reason of an estate of inheritance having been given to the mother. And the case of *Kenebel v. Scrafton* (before referred to) confines the exception to the case where both wife *and* children are provided for by the will.

Taking, therefore, the rule of law to be, that *the children* of the marriage must be provided for in order to prevent the revocation of the will, it is obvious that no provision whatever is made by this will for any child of the marriage; and whether any provision whatever is made for *the wife* by the devise to her of the estate for life, upon the condition expressed in the will, or whether she could claim a provision by her right to dower, we give no opinion whatever, because it is obvious that such provision for the wife, if it exists at all, is limited to her for life only, and cannot be extended in any way to form a provision for the children of the marriage.

But it is further objected that an after-purchased estate did not pass by the will, but descended upon the son in fee, and thereby became a provision for him, and prevented the revocation of the will. In the first place we answer, that no case can be found in which after-acquired property, descending upon the child, has been allowed to have that effect. And indeed such a proposition seems incompatible with the nature of a condition annexed to the will, which, so far as relates to the existence or extent of the provision, must, in its own nature, have

reference to the existing state of things at the time the will itself was made.¹ But, secondly, it appears to us a conclusive answer to the objection, that, upon the statement of facts in the special verdict, the testator had in him, at the time of making his will, an equitable interest in the estate in question, which equitable interest passed to the devisee under his will, so that the subsequent conveyance of the legal estate to the testator would give no real or beneficiary interest to his heir at law, but would make him a trustee for the devisee. For it is well established that an estate contracted for will pass under general words of devise in a will, even though the agreement to purchase is not to be carried into execution until a future day, which does not occur until after the time when the will bears date. See *Potter v. Potter*, 1 Ves. Sen. 437; *Greenhill v. Greenhill*, Pre. Chanc. 320; see also the case cited from the Rolls in 7 Ves. Jun. 436, 16 Ves. Jun. 253; *Lawes v. Bennett*, 1 Cox, 167. And, in this special verdict, it appears that the contract to purchase so entered into by Joseph Fox upon his dying intestate and unmarried, descended upon and came to John Fox, his elder brother and heir at law, and sole next of kin, and the person entitled to take out administration of his personal estate. John Fox, therefore, at any time after his brother's death, had the right to file a bill in equity for the specific performance of the contract, and was therefore seised of the equitable estate at the time of making his will.

Holding, therefore, as we do, that the beneficiary interest in this estate passed under the devise, we consider the descent of the legal estate upon the child of the marriage to have formed no provision for him, but that he was left wholly unprovided for, as he neither took anything under the will, nor anything (if that would have been sufficient) by descent from his father.

We therefore think the will revoked, and that the lessor of the plaintiff is entitled to have the judgment affirmed which has been already given for him on the special verdict. And this makes it unnecessary for us to give any judgment upon the bill of exceptions tendered by the lessor of the plaintiff; for, as he is entitled to our judgment on the facts found by the jury, that bill of exceptions may for the present be considered as wholly immaterial, or as if it had never been tendered at the trial; although, at the same time, we have no hesitation in declaring our opinion to be, that the learned judge was right in admitting the evidence therein mentioned, but wrong in rejecting the evidence which was offered to prove that Joseph Fox entered into the agreement of purchase, stated in the bill of exceptions, as the agent of John Fox.

Upon the whole, therefore, we are of opinion that the judgment of the Queen's Bench must be affirmed.

*Judgment affirmed.*²

¹ And in *Baldwin v. Spriggs*, 65 Md. 373 (1886), it was held, that the descent of property on a child did not overthrow the presumption of revocation.

² Prior to this case, the ecclesiastical courts had held that marriage and the birth of issue did not cause an absolute revocation of a prior will, but only raised a presumption of revocation which was rebuttable by parol evidence that the testator did

GOODS OF CADYWOLD.

COURT OF PROBATE. 1858.

[Reported 1 Sw. & Tr. 34.]

T. C. DIED in 1857, leaving a duly executed will, dated the 29th March, 1828, whereof he appointed Elizabeth Soundy, spinster (afterwards Elizabeth Cadywold), his intended wife, and two others, executors.

By his will he devised all his real estate to E. Soundy, his intended wife, for life, and after her death he directed his executors to sell the same, and bequeathed the money to arise from such sale to and amongst all and every his child or children by his said intended wife living at his decease or born in due time afterwards, and the residue of his personal estate he bequeathed to Elizabeth Soundy, his intended wife, for her own use absolutely.

Subsequently to the execution of this will the deceased intermarried with Elizabeth Soundy, and died leaving his said wife and four children of the marriage him surviving. Mrs. Cadywold having been at first advised that the will was valid on the authority of *Kenebel v. Scrafton*, 2 East, 541, applied to the registry as executrix (the two other executors having renounced) for probate, and was there directed to make application to the court.

Dr. Addams, Q. C., said he was instructed to move for probate of this paper, but, the law being as held in *Marston v. Roe d. Fox*, and *Israell v. Rodon*, he apprehended it could not be granted.

SIR C. CRESSWELL. It seems at first sight rather startling to say that a will like the present, executed in contemplation of marriage, and providing for the wife and children of the marriage, should be revoked

not intend the will to be revoked. See *Johnston v. Johnston*, 1 Phillim. 447 (1817); *Talbot v. Talbot*, 1 Hagg. Ecc. 705 (1828); *Johnson v. Wells*, 2 Hagg. Ecc. 561 (1829); *Fox v. Marston*, 1 Curt. 494 (1837). But in *Israell v. Rodon*, 2 Moore P. C. 61 (1839), the Privy Council followed the principal case, SIR HERBERT JENNER saying, p. 63: "But the case of *Fox v. Roe dem. Marston*, being now the last decision upon this point, must, to a certain extent, govern the proceedings in the ecclesiastical courts, and the principles upon which those cases (if any should hereafter arise) are to be determined: because in that case it is expressly laid down that it does not depend upon the presumed intention that the deceased would alter his will under the change of circumstances, but that the rule is, that it is to be considered a *tacit* condition annexed to the will, that at the time of making that will it should not have any effect, provided the deceased had a wife and child of the marriage subsequently born; and that is the rule now which must be applied, not only in the courts of common law, but also to any cases which may arise in the ecclesiastical courts, with respect to personal property."

In *Yerby v. Yerby*, 8 Call, 334 (Va. 1802), and *Wheeler v. Wheeler*, 1 R. I. 364 (1850), a widower, with children, married again and had children by the second marriage; and in each case it was held that the presumption of revocation was rebuttable and rebutted. But see *Nutt v. Norton*, 142 Mass. 242 (1886).

by such marriage and the birth of a child ; but on the cases you have cited, there is no doubt that the law so stands, and I must reject the motion for probate.¹

INGERSOLL *v.* HOPKINS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[*Reported 170 Mass. 401.*]

APPEAL, by the heirs at law and next of kin of Charles D. Ingersoll, from a decree of the Probate Court admitting to probate an instrument purporting to be his last will. The case was heard by *Knowlton, J.*, who entered a decree affirming the decree of the Probate Court, and, at the request of the appellants, reported the case for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in December, 1897, and afterwards was submitted on briefs to all the justices.

W. H. H. Emmons & W. Bolster, for the appellants.

A. Hemenway, (*E. B. Adams* with him,) for the appellees.

FIELD, C. J. The will of Charles D. Ingersoll, of Boston, was executed on October 20, 1891, and in it he gave all his property to Mary Alice Payson, of said Boston, "single woman," and appointed her one of the executors, and requested that the executors "be required to give no sureties on their official bonds." It appears from the testimony admitted by the justice who reported the case to this court, that the testator and Miss Payson were married on October 19, 1892 ; that the testator died on September 28, 1896 ; that prior to the time when the will was executed the testator and Miss Payson had mutually promised to marry each other ; that the contract of marriage remained in force from the time of the engagement until the marriage ; and that she lived with him as his wife from the time of the marriage until his death. From this evidence in connection with the will the presiding justice found, as matter of fact, so far as he properly could, that it appears from the will itself "by fair inference from its provisions as applied to the parties and the subjects to which it relates, that the will was made in contemplation of the marriage that was subsequently solemnized," and he affirmed the decree of the Probate Court allowing the will.

The question of law in this case depends upon the construction to be given to St. 1892, c. 118, of which the first section is as follows : "The marriage of any person shall act as a revocation of any will made by such person previous to such marriage, unless it shall appear from the will itself that the will was made in contemplation of such marriage, or unless and except so far as the will is made in exercise of a power of

¹ See *Francis v. Marsh*, 54 W. Va. 545 (1904).

appointment and the estate thereby appointed would not, in default of appointment, pass to the persons that would have been entitled to the same if it had been the testator's own estate, and he or she had died without disposing of it by will."

It is manifest, we think, that from the will itself, considered independently of the testimony admitted by the presiding justice, it does not appear that the will was made in contemplation of marriage with Miss Payson. It is impossible to hold, in every case where a testator by his will gives property or all his property to a woman who is unmarried and makes her his executrix, that it appears from this that at the time when he made the will he contemplated marrying her and made his will in contemplation of such marriage. It does not appear that there was any dispute or uncertainty as to the Mary Alice Payson intended, or that any evidence was necessary to identify her or the estate which was devised and bequeathed to her. The evidence was admitted to show another fact existing at the time when the will was made, namely, that at that time the testator was under a contract of marriage with her, and then, by considering this fact in connection with the provisions of the will, the presiding justice drew the inference that the will was made in contemplation of the marriage with her which afterwards took place. It was in effect conceded by both sides that, although the will was made before St. 1892, c. 118, took effect, yet, as the marriage took place after the statute took effect, the statute was applicable to the case. See *Swan v. Sayles*, 165 Mass. 177.

The counsel for the appellees cite the decisions of this court upon the construction of what is now Pub. Sts. c. 127, § 21, which section is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional and not occasioned by accident or mistake." Under the statutory provision which now constitutes this section the court held that parol evidence is admissible to show that the omission by a testator to provide in his will for any of his children or for the issue of a deceased child was intentional, and was not occasioned by accident or mistake. *Converse v. Wales*, 4 Allen, 512. But the section does not require that it should appear from the will itself that the omission was intentional, and it well may be that the reason for using the different phraseology in St. 1892, c. 118, was that the Legislature did not intend to leave the question whether a will was made in contemplation of a marriage which subsequently took place to the uncertainty which often attends the proof of facts by oral evidence.

The counsel for the appellees also rely upon the construction which has been given to what is now Pub. Sts. c. 127, §§ 24, 25. *Fay v. Fay*, 1 Cush. 93. *Brimmer v. Sohler*, 1 Cush. 118. These sections are as follows: "Sect. 24. Every devise shall be construed to convey all

the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate. Sect. 25. An estate, right, or interest in lands acquired by a testator, after the making of his will, shall pass thereby in like manner as if possessed by him at the time when he made his will, if such manifestly and clearly appears by the will to have been the testator's intention." The decisions are to the effect that the intention of the testator under these sections need not be declared in express terms in the will, but that it is sufficient if the intention can be clearly inferred from particular provisions of the will, or from its general scope and import. The decisions give no sanction to the doctrine that such intention can be shown by evidence other than that derived from the will itself.

The statute in England on the subject is as follows: "And be it further enacted, That every Will made by a Man or Woman shall be revoked by his or her Marriage (except a Will made in exercise of a Power of Appointment, when the Real or Personal Estate thereby appointed would not in default of such Appointment pass to his or her Heir, Customary Heir, Executor or Administrator, or the Person entitled as his or her next of Kin, under the Statute of Distributions)." 1 Vict. c. 26, § 18. There it is held that no intention of the testator, even though expressed in the will itself, can prevent the revocation of the will by a subsequent marriage. *Otway v. Sudleir*, 33 L. T. 46. *In re Cadynwold*, 1 Sw. & Tr. 34. Jarm. Wills, (6th ed.) 110 *et seq.* Our statute follows closely the English statute, inserting only the exception, "unless it shall appear from the will itself that the will was made in contemplation of such marriage." The intention of our Legislature apparently was not to follow the English statute as interpreted by the English courts, when it appeared from the will itself that it was made in contemplation of a marriage which subsequently took place, but to follow it in other respects, and to exclude from consideration any evidence not derived from the will itself.

The statute of Georgia more nearly resembles ours, and it is there held that parol evidence cannot be received to show that the will was made "in contemplation of the event" of marriage or the birth of a child. *Ellis v. Darden*, 86 Ga. 368.

In the opinion of a majority of the court, St. 1892, c. 118, means that when the will is not made in the exercise of a power of appointment, it must be apparent on the face of the will itself that the will was made in contemplation of "such marriage," either by an express declaration in the will to that effect, or by language in the will from which such contemplation may fairly be inferred, otherwise a subsequent marriage "shall act as a revocation."

A decree should be entered that the decree of the Probate Court allowing the will be reversed, and that the will be disallowed, and the case remanded to the Probate Court for further proceedings.

Decree accordingly.

JONES'S ESTATE.

SUPREME COURT OF PENNSYLVANIA. 1905.

[Reported 211 Pa. 364.]

OPINION BY MR. JUSTICE POTTER.

The questions presented by this appeal, as stated by the appellant, are:

1. Does a legacy, in these words, "one third to my wife, Mary Brown Jones," lapse, when the wife subsequent to the date of the will, at her own instance, obtains a divorce a vinculo matrimonii?

2. Is a bequest "to my wife Mary Brown Jones" revoked by implication, by reason of absolute divorce?¹

It is elaborately argued that as matter of law, the bequest to Mary Brown Jones was impliedly revoked by reason of the divorce. No authority has been cited in support of the proposition that divorce in itself is sufficient to work a revocation of a will, and we are not aware that any exists. The only case which has been cited by counsel as sustaining this position is *Lansing v. Haynes*, 95 Mich. 16. But examination shows that the Michigan statute allows the court to determine whether the subsequent changes in the condition or circumstances of the testator, are sufficient to work an implied revocation of the will. And the decision in that case rested also upon the fact, that pending the divorce proceeding there was a settlement of the property rights of the parties. A division of the real estate was made, each deeding to the other. An agreement was also made by which the husband conveyed to the wife certain personal property, and she agreed to release him from all demands of every kind or nature. The agreement stated that it, and the deeds executed by them, were intended as a property settlement between them. This was a practical satisfaction of the bequest, and amounted to an ademption.

As we read this decision, it was controlled by the fact of the settlement of property rights between the parties and not by the divorce itself. At common law, the doctrine of implied revocation of a will from change of circumstances, did not include divorce. In fact the instances were few, under the common law, in which an alteration of circumstances was held sufficient to justify an implied revocation. Both at common law and under the statutes of most of the states, it is only certain definite changes in the condition or family relations of the testator which impliedly revoke a will, executed before such changes. The great weight of authority is that no changes beyond the few which have been many times specifically enumerated and recognized as sufficient for the purpose, can have this effect: Page on Wills, sec. 280. A will may be so easily revoked by the testator in his lifetime that the courts have been slow in permitting changes in circumstances to do,

¹ Only so much of the opinion of Mr. Justice Potter as relates to this second question is printed.

by implication, what the testator may so readily do for himself. In *Wogan v. Small*, 11 S. & R. 141, TILGHMAN, C. J., said: "There is one case, and only one, in which it has hitherto been thought proper to decide, that the revocation of a will might be implied from an alteration of circumstances, and that is, when the testator married and had a child, subsequently to the making of his will; but both circumstances must concur; . . . The danger of this principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step. We have the less reason to resort to implied revocation, as our legislation has provided for the case of subsequent marriage or children by the Act of April 19, 1794, 3 Sm. L. 143. . . . Once establish the judicial habit of examining the situation of a man's fortune or family, and revoking his will, because he has made an absurd or an inhuman disposition of his property, or because we merely suppose he was ignorant of the state of his affairs, or of the law, and no man's will is safe." These words were weighty then, they should be equally so now.

The opening sentences in *Marshall v. Marshall*, 11 Pa. 480, are obiter dicta, for there was no occasion in that case to consider the question of what was sufficient to justify an implied revocation of a will. That subject was not before the court. The testator in that case, after devising one tract of land to one son and another tract of land to another son, subsequently sold the first tract. It was urged that this would work a revocation of the whole will. But the court decided that the sale affected only the devise of the tract in question, and the residue of the will remained in full force. It was a case of ademption, which applies only to the subject-matter of testamentary disposition. When the subject-matter bequeathed is sold, or disposed of, it is thereby completely extinguished, and nothing remains to which the words of the will can apply. The principle of ademption is entirely distinct from that of an implied revocation of the terms of the will. Ademption has to do with the subject-matter of the bequests, while the doctrine of implied revocation is founded upon a presumed neglect of duty, upon the part of the testator, or upon a change in his family relations. Ademption involves action upon the part of the testator; the doing of some act with regard to the subject-matter, which interferes with the operation of the words of the will. That is he anticipates the gift there made, by bestowing it during his lifetime upon the legatee, or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will. Nothing of that kind has been done in the present case. The testator has not interfered with his estate in any way inconsistent with the terms of his will.

The statutory rules in Pennsylvania, as to the revocation of wills, are reviewed by READ, J., in *Walker v. Hall*, 34 Pa. 483, and on page 487 he says "we have in reality substituted for the common-law rule,

one of our own, depending entirely upon our statutory enactments" and he concludes with the statement that our rules are not open to the doctrine of implied presumption. In *Young's Appeal*, 89 Pa. 115, the court held that the testamentary paper was executed under a special power, and not under the statute of wills. Whatever is there said, as to a change in circumstances which create new moral duties, amounting to implied revocation, is obiter dicta, in so far as it goes beyond the conditions enumerated in the statutory enactments. The decision was that the will was revoked by the birth of a son to testatrix after the making of the will. While it was the disposition of an equitable estate, yet it followed the principle of the statute.

We are by no means singular in holding to the doctrine that the changed condition of the testator must be within the conditions named in the statutes, for this view prevails largely in other states; for instance, in *Re Comassi's Estate*, 107 Cal. 1, it is said, "in order to determine whether a will has been properly executed or revoked, or whether, after its execution, there has been such a change in the status or personal relations of the testator as in law will effect its revocation, we have only to determine whether the changed condition of the testator is within the condition named in the statute (cites code). . . . The effect of these provisions is to do away with the doctrine of implied revocation, which was for so many years a subject of controversy in the English courts, and which, in many of the states of this country, is still permitted under a clause in their statutes, authorizing a revocation to be 'implied by law for subsequent changes in the condition of the testator.'" And in *Davis v. Fogle*, 124 Ind. 41. "It is manifest that no act, thing or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills." In *Noyes v. Southworth*, 55 Mich. 173, the court says: "There is no sound reason that we can perceive why, in the absence of statutes, implied revocation should be extended." And in *Schouler on Wills*, sec. 427, it is said: "In short, revocation of a particular will by mere inference of law or presumption, is limited to a very few instances in our modern practice. Modern legislation itself repudiates in England and some of our states, the old theory of implied intention to revoke on the ground of alteration of circumstances, and what is left of that theory aside from such statutes it would be very difficult to say."

A case much like the present, is *Card v. Alexander*, 48 Conn. 492. There the bequest was to "my wife Amelia." A year and a half after the execution of the will, the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, without changing his will. It was held that the bequest was not to be regarded as conditioned upon the wife continuing to be such until his death; and that the divorce did not as matter of law impliedly revoke the will. The circumstances of the divorce in that case spoke more strongly against the claimant than here. In the present case, it was the misconduct of the testator which caused the divorce.

We can see nothing in the facts of this case, which would justify any extension of the doctrine of implied revocation. The reason which lies behind the doctrine as defined both in the common law and by the statutes, is that some obvious injustice may be prevented. That some moral duty, which has been overlooked, it is presumed, by the testator, may be discharged. What would be the result of holding in this case, that the change in circumstances worked a revocation? Only this: the whole estate of testator would go to his son, to the entire exclusion therefrom of his former wife and the mother of his child. Can it be said that the obtaining by the wife of a divorce, by reason of the misconduct of the testator, entailed upon him any moral duty to destroy the provision, which he had made in his will, for the woman who was for years his faithful wife, in order to pile up far more than a competency for their child.

The only inference which can be drawn from the record in this case, is that the testator, and he alone, was responsible for the rupture of the marital ties. It may well be, then, that by the provision in his will he intended to make some reparation for the sorrow and distress he brought upon his wife. To impute to him such intention would be more kind, than to presume, as is urged in the argument, that he was filled with resentment, and became possessed by an ignoble purpose which he failed to carry out. He must have known that he could change or destroy his will at any time, yet he did not do so.

We agree with the conclusions reached and stated by the auditing judge in his careful and able opinion, that "To hold under the facts in this case that the divorce revoked this bequest would not be in accordance with statutory regulations, and would be extending the doctrine of an implied revocation beyond any authoritative adjudication; and would be contrary to the express and implied intention of the testator."

The specifications of error are overruled. The decree of the orphans' court is affirmed and this appeal is dismissed, at the cost of the appellant.

MR. CHIEF JUSTICE MITCHELL, dissenting.

NOTE.—In Iowa it has been held, in the absence of any State Statute, that the birth of a child alone revokes a will. *McCullum v. McKenzie*, 26 Iowa, 510 (1869); *Negus v. Negus*, 46 Iowa, 487 (1877). In Illinois, where a wife takes as heir all her husband's real estate if he dies without issue, marriage alone is held to be a revocation of a prior will. *Tyler v. Tyler*, 19 Ill. 151 (1857).

SECTION IV.

REPUBLICATION AND REVIVAL OF WILLS.

A. *Republication.*

BECKFORD v. PARNECOTT.

QUEEN'S BENCH. 1596.

[*Reported Cro. El. 493.*]

EJECTIONE FIRMAE. Upon a special verdict the case was, that one Richard Parsons was seised of divers lands in Aldworth, and had issue four daughters, viz. : Barbara, Joan, Frances, and Mary ; and 27 Eliz. made his will in writing, and thereby devised all his lands in Aldworth to Barbara and Joan his daughters, and made them his executrixes ; and after in 33 Eliz. purchased other lands in Aldworth (which are the lands in question) ; and after one J. S. came to the devisor and desired that he would sell unto him those lands which he lately purchased ; and he said, " No, they shall go, with my other lands in Aldworth, to my executrixes." Afterwards in 34 Eliz. he being sick, the will was read unto him, and he said nothing thereto ; but then gave divers legacies of goods to others, and caused them to be written and annexed in a codicil thereto, and died. Whether those lands newly purchased shall pass to the executrixes by that will ? was the question : viz., Whether by those words used to a stranger, or the annexing of the codicil to the will, being only concerning goods, be as a new publication of his will to make those lands to pass. &c. — First, it was agreed by the counsel on both sides, and by the Justices, that if the devisor after the purchase of that land had made a new publication of his will, and showed his intent that those lands should pass, it had been a good devise of them ; for the words in the will are, " all his lands in Aldworth," which are apt enough, and sufficient to carry them ; and he could not have added more apt words thereto. But afterwards all the JUSTICES (*GAWDY absente*) held, that it is a new publication of his will, and sufficient by the words to J. S. for that shows his intent sufficiently, and the will writ hath words sufficient. And FENNER held, that the annexing of the codicil thereto is a new publication as to it ; for therein he affirmed that it should be his will at that time. But the other JUSTICES doubted thereof, because he doth not show thereby any intent that this will should be for his purchased land ; nor that he then remembered them. But for the reasons before, it was adjudged for the plaintiff, that those lands well passed by the will.

IZARD v. HURST.

CHANCERY. BEFORE SIR JOHN TREVOR, M.R. 1698.

[Reported Freem. C. C. 224.]

THE defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.¹

¹ "In my opinion, then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it. What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so, if it is to be read as if I had written it over again; the 'present' treasurer would be a different person. So I conceive if I had said, I devise all the estates of which I am now seised. I afterwards purchase lands and republish my will. I confess I think the same principle applies as governed Lord Cottenham in *Cole v. Scott* [1 Hall & Tw. 477]. My will must be read in the same way as if I had said, I give all the lands of which I, on this 24th day of March, 1851, am seised, and if I republish that in 1852, it will still be read just as it was before; it will refer only to that which is there mentioned. Now, the cases in which this question has often arisen and with which we are familiar are these: where a party says by his will, 'I give all my lands,' what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having immediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, 'all the estates which I had power to give.' Therefore, it seems to me that the distinction is manifest between an express date or an express name fixed upon. You cannot alter that by saying you republish the will at a different time. You do republish it so as to make it operate from that other later time, and if there be any legal effect that is brought to operate by what has taken place in the mean time, you have the benefit of that. But you cannot alter the meaning of the will, which you will be doing if, by republishing the will, you are to treat the testator as having meant something by his will different from that which he has there expressed. With regard to the case in the Court of Error of *Williams v. Goodtill* [10 B. & C. 895], I think that is all perfectly intelligible and right. A testator there, under the old state

BARNES v. CROW.

CHANCERY. 1792.

[Reported 4 B. C. C. 2.]

WILLIAM BALCOMBE being seised and possessed of real and personal estate, made his will, bearing date 29th November, 1784, duly attested to pass real estate, and thereby gave and devised all his messuages, &c., and all other his real estate, situate at Feversham, in the county of the law, devises all his lands : that passes all he was then seised of ; he republishes his will afterwards by a codicil, the legal effect of that is to pass after-purchased land, because the will speaks from that time. In both cases it means all the lands he had power to dispose of by law. The effect could not be altered by the circumstance that in his codicil he truly recites that by his will he had devised all he was then seised of ; it only states what is the legal effect of his will. He republishes his will : the legal effect of republishing it must have its full operation. It does not seem to me that that case at all presses upon me. I was turning in my mind whether I could recollect any cases in which there was this sort of devise, 'I give to all my present children,' then an after-born child, and a codicil republishing the will : certainly, according to my impression, that would not give to the after-born child. I am not clear that that would quite govern the case, because the courts have stretched a good deal about children in a way that they have not done in other cases. I rather think that it would not. At the same time, I was not prepared for this sort of argument, and have therefore not looked into the point. If, upon looking into it, or being assisted by any suggestion from counsel on one side or the other, anything should be brought to my mind to show I am wrong, I should be most ready to admit it, and the more so because I do firmly believe that this would have been what the testator would have wished to do if his attention had been called to it. I think, although I cannot so construe what he has written, I do form a very shrewd guess as to what he would have written if his attention had been called to it, and he would have wished to write something which would have the meaning that it is contended the republication of the will does give to it. I do not find that within the four corners of the will, therefore I do not act upon it as the intention which is to govern me." — *Per* LORD CRANWORTH, V. C., in *Stilwell v. Mellersh*, 20 L. J. Ch. 356, 361 (1851).

In *Estate of McCauley*, 138 Cal. 432 (1903), the testatrix on February 12, 1900, executed a will in which she made several bequests to charitable institutions. On March 16, 1900, she executed a codicil which did not change any of these bequests. Twenty-eight days later she died. By statute it was provided that no charitable bequests could be made "except the same be done by will duly executed at least thirty days before the decease of the testator." A statute also provided that "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." It was contended that the execution of the codicil caused the will to date from the date of the codicil and that therefore the charitable bequests were void. But the court sustained the bequests, saying, p. 436 : "For some purposes, no doubt, the will speaks from the date of the codicil, but this is true only so far as the codicil requires that it should so speak. It is entirely consistent with the statute and the codicil now before us, that the contested bequests should stand as made of the date of the will. The testatrix declared the will as first executed to be her will, except as to the changes made in the codicil, and the statute (sec. 1287) says that the effect of the codicil is "to republish the will, as modified by the codicil," and not otherwise. To construe the statute as is contended for by appellants, is to leave a large part of the estate undisposed of, as well as to defeat the object of the testatrix. We do not think it should be given any such construction."

of Kent, or elsewhere, to the plaintiffs in trust to sell, and dispose of the money arising therefrom, in the manner thereby directed. After making the said will, the testator made a codicil thereto, bearing date 5th November, 1785, not duly attested to pass real estate, and by which he made some provisions arising from the marriage of one of his daughters. After the making and publication of his will and such first codicil, he contracted with Richard Horton, for the purchase of an equity of redemption of premises in Feversham, then in mortgage to Mary Hulbard, for a term of five hundred years; and Richard Horton, by indentures of 2d and 3d January, 1786, conveyed to testator and his heirs, the premises, subject to the mortgage debt, and Mary Hulbard dying before the mortgage-money was discharged, the executors, by indentures of 4th September, 1786, in consideration of the payment of the mortgage-money and interest due, conveyed (by the direction of the testator) the term of five hundred years to Thomas Roper, and the testator covenanted to pay the mortgage-money, and entered into a bond to Roper for that purpose. After this transaction, the testator made another codicil to his will, dated 27th October, 1788, whereby he made some alterations in the state of his affairs, and disposed of a leasehold estate, but which did not mention the lands purchased since the date of the will, which concluded thus: "In witness whereof I, the said testator William Balcombe, have to this my writing contained in this, and part of the preceding sheet of paper, which I declared to be a codicil to my said last will and testament, and which is to be accepted, and taken as part thereof, set my hand, &c.," and the execution thereof was attested by three witnesses.

The first codicil was begun and partly written upon the last sheet of the testator's will, and was a continuation from the foot of the said will, and the second codicil was begun, and partly written upon the last sheet of the first codicil, and was a continuation from the foot of the said first codicil, and the testator's will and codicils were annexed to each other, by, or at the request of, the testator.

The defendants, who were heirs-at-law and in gavelkind of the testator, having got into possession of the lands purchased after the will, the devisees in trust filed the present bill, submitting that the latter codicil was a republication of the testator's will, and that the after-purchased lands passed thereby, and praying a declaration to that purpose, and that the defendant might be decreed to deliver to the plaintiffs possession thereof.

Mr. Solicitor-General and Mr. Hall, for the plaintiffs.

Mr. Selwyn and Mr. Abbot, for the defendants, the heirs-at-law.

Mr. Mitford and Mr. Alexander, for defendants in the same interest with the plaintiffs.

LORD COMMISSIONER EYRE pronounced the judgment of the court to this effect: —

This cause stood over, in order that the court might look into the cases of *Acherly v. Vernon* [Com. 381], and *Attorney-General v. Downing* [Amb. 571].

The question might be considered as of great difficulty, if it was not so determined that the court is not at liberty to review it; because the two cases seem to be directly opposite. But it appears that *Acherly v. Vernon* is determined; and it is a case of such authority that everything must give way to it, and must be considered as determined by it. It is a case of great weight, because it was first determined by Lord Macclesfield, and affirmed by the House of Lords, after questions put to the judges. It was there held that the codicil, "ratifying and confirming the will;" amounted to a republication, and became incorporated with it. It is matter of deduction from thence, that the publication of such a codicil in the presence of three witnesses, is a republication of the will.

There are four cases stated, in the report of that case, as having been cited; two of which seem of importance. In the first (*Lytton v. Lady Falkland*) the words were, "I make this codicil, which I will shall be added to, and be part of, the will I have formerly made." Here was a manifest reference to the will, and a declaration that the codicil was meant to confirm it, and all that annexation relied upon in the *Attorney-General v. Downing*. Lord Cowper, assisted by Sir John Trevor, Master of the Rolls, Lord Chief Justice Trevor, and Mr. Justice Tracy, decreed it was no republication, "because, since the Statute 29 Car. 2, there can be no devise of lands by an implied republication; for the paper in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses." This was on the 16th June, 1708.

In the other case, *Penphrase v. Lord Lansdown*, 11 Ann, upon the Earl of Bath's will; the will was made 11th Oct., 1684, and only executed: but on the 15th August, 1701, the testator made a codicil, and, sending for seven persons, published it in these words: "This is my will, and I publish this codicil as part thereof." Here was a strong republication of the will; but it was held by Parker, C. J., and the Court of King's Bench to be no republication, for, since the Statute 29 Car. 2, there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. But, at the importunity of the defendant, a special verdict was found.

Here is a rule of construction upon the Statute of Frauds, clearly expressed and positively laid down, by the first men of their day, and that early after the passing of the Statute, that there cannot be an implied republication; nothing short of a re-execution of the will shall be sufficient. In *Acherly v. Vernon* it is clear, that Lord Macclesfield did not adhere to his own rule in *Penphrase v. Lord Lansdown*, because the will was there (in *Acherly v. Vernon*) held to be republished without re-execution, and consequently must have been republished, notwithstanding the Statute of Frauds, by implication.

If the rule first laid down by Cowper and Lord Macclesfield is not sound, and the will may be republished by implication, I do not

wonder that Lord Hardwicke, in *Amb. 93 (Gibson v. Rogers)*, should express doubts on the special grounds, upon which it was argued before him, that a codicil executed before three witnesses might amount to a republication, and inclined to agree that every codicil duly attested may be a republication of the will.

If we disentangle ourselves from the rule, the declaration of the testator at the publication, as to a former will, must be admitted, because the codicil becomes part of that former will; and the will being attested by three witnesses, the declaration is attested by three witnesses, and does not break in upon the principle of the Statute.

Before the Statute, any declaration of the testator would have been sufficient to republish the will: since the Statute, a re-execution seems not necessary, but the declaration must be in writing, and attested by three witnesses. With respect to the words used in the declaration, Lord Hardwicke might well say, in *Gibson v. Rogers*, that he could see no great difference between the words used there, "I desire that this codicil may be adjudged to be part and parcel of my will," and the words, "I confirm or republish my will," which it had been admitted in the argument would have been sufficient.

In the *Attorney-General v. Downing*, Lord Camden supposed that a particular intent to republish ought to appear, and that annexation, or a particular declaration in the codicil, of the intent, would be sufficient.

If so, not only Lord Hardwicke's opinion, but *Acherly v. Vernon*, cannot stand; for, as there was no express republication, but the testator referred to, and made alterations in the will, and gave demonstration that he considered it as his will, — and that was considered as a republication: but he had it not in his intention to do any formal act to republish his will.

I am inclined to stand upon the general proposition of Lord Hardwicke, and to think that the will before us was republished.

The present case has circumstances that seem to bring it within that of the *Attorney-General v. Downing*. The testator meant his will to operate upon all his lands, and thought that the will was brought down, by the codicil, to the time of his death. He has annexed the codicil to the will, not by wafers, or folding them together, but by an internal annexation. So that, in fact, the whole was published together, at the time of publication of the codicil. But I am afraid of relying upon these circumstances, for fear of intrenching upon the Statute of Frauds, by raising a republication out of evidence in its nature parol: I think it better, therefore, to rely on the general ground.

The next question is, what will be the effect of this opinion upon the cause; upon which I have a doubt. The prayer of the bill seems to seek a declaration from us, that the codicil is a republication of the will, and acts on the after-purchased estate. The question of republication might have been tried at law in an ejectment.

Mr. Hall, for the plaintiffs (in the absence of *Mr. Solicitor-General*),

stated, that the bill charged the estates in question to be affected by a mortgage-term then outstanding, that the heir was in the possession, and prayed that the defendants might deliver up such possession to the plaintiffs. That notwithstanding the case of *Bristow v. Pegge*, 1 Term Rep. 758, and other similar determinations in the time of Lord Mansfield, in which it had been held, that, as between the heir and devisee a mortgage-term could not be set up to nonsuit the plaintiff in ejectment, but the plaintiff should recover subject to the charge: yet, in the subsequent case of *Doe, on the demise of Hodsden v. Staple*, 2 Term Rep. 684, a contrary doctrine had prevailed, it having been there determined, that a plaintiff must recover on a legal, not an equitable title, for that a mortgage may be set up as a bar to the plaintiff, even though he claim only subject to the charge; therefore a court of equity alone could, in the circumstances of this case, administer relief.

LORD COMMISSIONER EYRE assented to this; and declared, that, in those circumstances, the ground for equitable interference was plain, and proceeded to pronounce the decree; by which he

Declared the will well proved, and the trusts to be carried into execution; that the codicil is a republication of the will, and the after-purchased estate passed thereby.

After the decree pronounced, Mr. Mitford mentioned a case of *Billing v. Turner*, before Lord Kenyon at the Rolls, where there was a similar decree.

LORD COMMISSIONER WILSON also added the case of [*Doe v. Davy*, Cowp. 158, as of the same sort, though relating to copyholds;¹ and] *Heylyn v. Heylyn*, B. R. 15 Geo. 3, Cowp. 130, where the codicil was held a republication, and observed, that the testator, saying "I desire the codicil shall be part of my will," is equivalent to saying they shall be one instrument.²

¹ This is from Lord Colchester's MS. notes, and Mr. Vesey, junior's Rep. p. 499. — BELT.

² See *Pigott v. Waller*, 7 Ves. 98 (1802); *Goodtitle d. Woodhouse v. Meredith*, 2 M. & S. 5 (1813); *In re Earl's Trust*, 4 K. & J. 673 (1858).

In *In re Champion*, L. R. [1893] 1 Ch. 101, the testator devised a cottage with all the land thereto belonging, described as "now in my own occupation." Five months later he purchased two fields adjoining the cottage and occupied them with the cottage till his death. Some four years later and shortly before his death, he executed a codicil changing his executors and trustees and confirming his will in other respects. The court held that the two pieces of land so purchased passed under the devise. NORTH, J. said, p. 108:

"Then my third ground is based on the codicil, which seems to me to be in favour of the Plaintiffs in two ways. It was made in 1877, long after the testator had purchased and entered into the occupation of the pink land, and he says: 'I declare this to be a codicil to my last will, dated the 9th day of April, 1873. Whereas I have by my last will devised and bequeathed my real and personal estate and given certain powers to Frederick Child and Henry Edward Turner as trustees, and appointed them executors.' This is, in my opinion, a recital that the testator has by his will devised and bequeathed all his real and personal estate. I do not think the words can be treated as equivalent to 'some of my real and personal estate'; I think they mean all, and they aid the construction of the will itself.

"But, then, further, we come to the final words of the codicil. After the recital

GREEN v. TRIBE.

CHANCERY. 1878.

[Reported 9 Ch. D. 231.]

ELIZABETH LOVE, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay

which I have read, the testator proceeds to revoke the will so far as the two trustees are concerned, and to substitute his wife Mary and his two sons in their place, and he proceeds: 'I declare that my said will shall take effect in the same manner as if the names of the said Mary Champion, Caleb Champion, and Clement Champion had been originally inserted throughout the said will instead of the names of Frederick Child and H. E. Turner. And I confirm my said will in other respects.' What is the effect of those words of confirmation? It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of the will, and when, under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point. There is, first, the case of *Beckford v. Parnecott*, Cro. Eliz. 493. Then there is *Barnes v. Crore*, 1 Ves. 486; 4 Bro. C. C. 2. The marginal note is this: 'A codicil duly attested to pass real estate, annexed by testator to his will of lands, is a republication of the will, and shall pass after-purchased lands, though not mentioned.' The reports are quite clear on the point, and the marginal note in *Brown* is perfectly accurate. Then there is *Yarnold v. Wallis*, 4 Y. & C. Ex. 160. The marginal note is: 'Lands purchased after the date of a will held to pass by a codicil made subsequently to their purchase; the codicil containing no expressions limiting the effect of the devise to lands comprised in the will.' There the purchase was made after the will, and after that the codicil was executed, and it was 'to be taken as part of the will'; and the testator said: 'I do hereby give and empower my son William Yarnold, when in the possession of the estates given to him by my will, to charge the same or any part thereof,' with a jointure for his wife. It was held that the codicil passed the after-acquired property. Lord Abinger, C. B., in giving judgment, said, 4 Y. & C. Ex. 164: 'Now, upon the words of this codicil, it is said, that the case is taken out of the general rule; that a codicil duly made to pass a testator's real estates amounts to a republication of the will, so as to make the will bear date with the codicil, and to affect all the lands the testator had at the time of the making of the codicil. That such is the general rule, I apprehend there is no doubt.' Then he went on to deal with the argument that the circumstances were special, and he applied the rule which I have mentioned.

"Then, again, there is *Doe v. Walker*, 12 M. & W. 591. There the will was made in February, 1837, and by it the testator devised all his lands situate in the parish of Great Bowden to trustees, on certain trusts. The testator made a codicil in 1838, and, after reciting the devises and bequests contained in his will, and that he had since determined to appoint C. an additional trustee for the purposes in his will mentioned, he gave and devised all his messuages, lands, &c., described in and devised by his will, situate at Great Bowden, &c., and also the several sums of money therein mentioned, to C., his heirs, executors, &c., upon the trusts in the will expressed and contained, and nominated him one of the executors of his will, and directed and declared that his will should be read and construed in the same manner, and should have the same operation and effect, as if C. had been appointed a trustee and executor together with and in addition to the other trustees, and in all other respects the testator ratified and confirmed his will. I quote this case because there

the income to her niece, Ellen Love, during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum of £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favor of my niece Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6, Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning the codicil was very like the codicil in the present case, and it was equally limited in expression. There it was held 'that the will was republished by the codicil, and passed real estates purchased by the testator after the date of the will and of the codicil.'

"That case is not exactly in point, because the will was executed before and the codicil after the date of the Wills Act; but I refer to it for the reason which I have mentioned, that the codicil was limited in its effect in the same way as the codicil in the present case.

"By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the Plaintiffs, the codicil makes the will take effect as if it had been executed at the date of the codicil; and in that case it is conceded, and there can be no doubt, that the land coloured pink would have passed under the will."

See also *In re Rayer*, L. R. [1908] 1 Ch. 685; *Hubbard v. Hubbard*, 198 Ill. 621 (1902).

ing my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two sixteenths, or would go according to the will and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

North, Q. C., and G. E. Cruikshank, for the plaintiff.

Cookson, Q. C., and Macnaghten, for other parties.

C. Browne, for the heir of the testator.

Kekewich, Q. C., and Badcock, for Ellen Love.

Fry, J., after stating the facts of the case, continued:—

It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will and testament there referred to had been described by its proper date, and as if the testatrix had declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me. First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with

regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord Penzance in *Lemage v. Goodban*, Law Rep. 1 P. & M. 57, "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the Statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is, whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force — in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a clear negative answer. The first to which I desire to refer is the case of *Crosbie v. Macdonald*, 4 Ves. 610. There the testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil. In the case of *Smith v. Cunningham*, 1 Add. 448, a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough v. Mar-*

tin, 2 Add. 239), there was no intention to revoke. In *In the Goods of De la Saussaye*, Law Rep. 3 P. & M. 42, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere with the contents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, implied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon v. Lord Reay*, 5 Sim. 274; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron v. Aaron*, 3 De G. & Sm. 475, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton v. Newbery*, 1 Ch. D. 234, the present Master of the Rolls took a different view. There the testator made a will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to

his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon v. Lord Reay*, but referring without disapproval to the earlier case of *Crosbie v. Macdoul*.

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must, if left to itself, fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application. *Doe v. Hicks*, 8 Bing. 475; *Farrer v. St. Catherine's College*, Law Rep. 16 Eq. 19.

I conclude, therefore, that the decision of the Master of the Rolls in *Burton v. Newbery* does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie v. Macdoul* and the cases which have followed it appear to me to be right in principle. The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice Blackstone describes it (2 Bl. Com. 450, Kerr's ed.), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of *Wade v. Nazer*, 1 Rob. Ecc. 627, the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Uppill v. Marshall*, 3 Curt. 636, the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing, unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original dispositions intended for them. This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it. The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which the testatrix died possessed, whether acquired before or after the date of her original will.

B. *Revival.*

GOODRIGHT d. GLAZIER v. GLAZIER.

KING'S BENCH. 1770.

[*Reported 4 Burr. 2512.*]

THIS cause had been tried at the Sussex Assizes: where a verdict had been given for the plaintiff, the heir-at-law to the testator, against the defendant, who was his devisee in two wills.

It now came before this court, upon a motion on the part of the defendant for a new trial; which was opposed by *Mr. Dunning* (*Solicitor-General*), *Mr. Burrell*, and *Mr. Kemp*, on the part of the plaintiff; who argued, that *both* wills were revoked; and consequently their client took as heir-at-law.

The question turned upon the revocation of the *first* will, by *making the second*.

The short of the case was this. The former will (being a will of *lands*) was made in 1757: the second, in 1763. The *former* was *never cancelled*: the *second* was *cancelled by the testator himself*. Both wills were in the testator's custody, at the time of his death: the second, *cancelled*; the first, *uncancelled*.

The counsel for the plaintiff, the heir-at-law, argued That the second will was a complete instrument, at the time when it was executed; that it clearly proved the testator's intention of revoking the former; and that the execution of it was as much a revocation of the former, as if he had thrown the former into the fire; that the preservation of it was merely accidental, and of no consequence; that it had been already totally extinguished, so that it could never revive; that, as it never had been republished, it remained a mere nullity; and that no subsequent event could hinder the execution of the second will from operating as a revocation of the former. The second will was therefore the testator's only subsisting will, so long as it remained uncancelled. And when he thought fit to cancel and destroy it, it is manifest that he meant to die intestate, and that his heir-at-law should take. If a woman makes a will, and then marries, her prior will is thereby revoked; and shall remain so, although she should immediately become a widow. They cited a case of *Ashburnham and Bradshaw*; and also the case *Ex parte Hellier*, 3 Atkyns, 798, where Sir George Lee gave sentence "that the execution of a second will is a revocation of a first, though the second be afterwards cancelled; and that the cancelling the second did not set up the first:" which, they said, was the same point, only that it was personal property. *Mr. Dunning* said, he had inquired into that case: and it was affirmed by the delegates.¹ They denied the two cases of *Eggleston v. Speke*, Carthew, 79, 1 Show. 89, 3 Mod. 259, and *Onions v. Tyrer*, 1 P. Wms. 343, to be like the present case. The former is only, "that a second will shall not revoke a first; if the second is not good in law, but void." The latter is, that "a second will, devising lands to the same person, and revoking all former wills; and this second will subscribed by three persons, but not in the testator's presence, shall not revoke the former will, so as to let in the heir-at-law." They insisted, that the Statute of Frauds does not alter any of the old requisites of revocation, except in the cases therein excepted. The same liberality, they said, ought to prevail in the revocation of wills, as in the making of them: and the true principle of the cases upon revocation of wills, both before and since the Statute of Frauds, is the *alteration of the testator's intention*. 1 Rolle's Abr. 614, 615, 616.

Mr. Serjeant Leigh was beginning to speak on the other side; but was prevented by LORD MANSFIELD, as the case was so plain as to render it unnecessary for the Serjeant to proceed.

¹ This is wrong. The case was compromised, and therefore did not come to a hearing in the Court of Delegates. See 1 Phillim. 427, n. — ED.

HIS LORDSHIP observed, with regard to the case *Ex parte Hellier* in 3 Atk. 798, that Mr. Atkyns only reports what passed in Chancery. There might be other circumstances appearing to the Ecclesiastical Court, which might amount to a revocation of a will of *personal* estate.

Here, the testator has, by *both* wills, devised the lands in question, *to the defendant*. His cancelling the second is a declaration "that he does not intend *that* to stand as his will." Does not that speak, "that his first will *shall* stand?" If he had intended to revoke the first will, when he made the second, it must have operated as a declaration "that the defendant should *not* take." But that could not be his intention; because he devises to the defendant by *both*.

As to cases of revocation of devises of land, contrary to the intention of the testator (as the case of the Earl of Lincoln, and many more), they turned upon legal subtleties. They have been *determined*; and therefore must govern all similar cases: but none of them are applicable to the present question.

Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is *not* his will. Here, he had two. He has cancelled the second: it has no effect, no operation; it is as no will at all, being cancelled before his death. But the former, which was never cancelled, stands as his will.

MR. JUSTICE YATES concurred with LORD MANSFIELD, for the same reasons. A will has no operation, till the death of the testator. This second will never operated: it was only intentional. The testator changed his intention; and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it. In the case of *Onions v. Tyrer*, there was no intention to die intestate: and therefore the heir-at-law was not let in. *Hellier's Case* might be rightly determined: there might be *collateral* evidence of an intention to revoke. That was a will of *personal* estate.

By the Statute of Frauds, "No devise in writing of *lands*, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing, *declaring the same*; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall *remain and continue in force*, until the same be burned, &c.; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, *declaring the same*." Now here are none of these circumstances used in what is pretended to be a revocation of this first will. Therefore the *first* will stands good.

MR. JUSTICE WILLES declared the same opinion; and gave the

same reasons; particularly repeating the clause in the Statute of Frauds concerning revocations: which showed, he said, that this is no revocation.

MR. JUSTICE ASTON was in Chancery, as one of the Lords Commissioners.

LORD MANSFIELD mentioned a cause at the delegates, between *Mason v. Limbrey*; where the testator, Samuel Mason, had made his will, of his real and personal estate; and properly executed two duplicates of it: one of which duplicates he kept in his own hands; the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate; and began to write over a new will, but never finished it: nor did he ever apply to Limbrey, to get back his duplicate. Sentence was given for the duplicate of the first will remaining in Mr. Limbrey's hands: for the imperfect sketch of the unfinished second will was no revocation of the first. He did not mean to die intestate. So, in the case now before us; if this second will is *not* the testator's will, it is no revocation of the first: he did not mean to die without any will at all.

*The rule for a new trial was made absolute:
and it was without payment of costs.¹*

¹ "Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side or the other. For whether there is a presumed revival, or a presumed revocation; still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances; and the case would then resolve itself into a question of intention.

"If it were necessary to decide the point, I should hold that it was not the presumption, when B. was cancelled, that A. should revive." — *Per* SIR JOHN NICHOLL, in *Moore v. De La Torre*, 1 Phillim. 375, 400 (1816).

In the argument of the same case before the delegates, *Mr. Warren*, of counsel for the plaintiff, after citing *Goodright v. Glazier*, continued thus: —

"In *Harwood v. Goodright*, Cowp. 87, 91, Lord Mansfield says, '*it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived.*' Lord Mansfield, speaking the sense of the court, considers this as a clear established rule at common law. — It stands upon the authority of these two cases."

The following dialogue then ensued: —

"*PER CURIAM.* MR. JUSTICE ABBOTT. That would go a vast length; — if you put it as an absolute proposition at law without any deduction, that the cancellation of the second will revives the first. — Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family, — that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for. — If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

"*Mr. Warren.* Your Lordships will do me the justice to recollect that I have only cited authorities.

"*PER CURIAM.* MR. JUSTICE ABBOTT. Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

"*Mr. Warren.* I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

"*PER CURIAM.* MR. BARON RICHARDS. But I think I may venture to say it has

NEWTON v. NEWTON.

COURT OF APPEAL IN CHANCERY IN IRELAND. 1861.

[Reported 12 Ir. Ch. 118.]

THE LORD CHANCELLOR [BRADY].¹ The petition of appeal in this case was presented by Philip Jocelyn Newton, the heir-at-law of the testator, John Newton, who contends that the decree of the Court of Probate is erroneous, and that that court ought to have pronounced John Newton to have died intestate.

The question depends on the legal position which we should assign to three or four documents; which are, first, a will made by John New-

not been universally so considered. — It is a great misfortune that *dicta* are taken down from judges, perhaps incorrectly, and then cited as absolute propositions.

"Mr. Warren. I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case, but he considers it as a point perfectly established.

"PER CURIAM. MR. JUSTICE ABBOTT. It certainly in the report is put as the settled law, excluding all question of intention.

"Mr. Warren. If it is the law, therefore whatever inconvenience may arise from it, it must remain the law, till it is altered by the Legislature, and nothing short of an Act of Parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the court to depart from the rule on account of any peculiar hardship." — *Moore v. Moore*, 1 Phillim. 408, 419-421 (1817).

"The clear result of all the cases, the common-sense of them, is that it must be ascertained whether it was or was not the intention of the deceased that the will should stand." — *Per* SIR JOHN NICHOLL, in *Hooton v. Head*, 3 Phillim. 26, 32 (1819).

"Now the legal presumption as to whether, by the destruction of a later will, the revival of a former uncanceled will is to be presumed, is a point that has been much controverted, but never very clearly settled. And perhaps the bare legal presumption upon such a case is not very material to be discussed. In the case of *Glazier and Glazier*, 4 Burrows, 2512, so far as respects the disposition of lands, Lord Mansfield is reported to have said that the former will is revived. But the correctness of that report and the soundness of the doctrine there laid down have been a good deal questioned. In these courts, as applies to wills respecting personalty, the presumption has been rather the other way, and against the revival of the former testament; it has been held that it requires some act to show an intention of such revival. As far as my own opinion goes, I cannot help saying that good sense and the reason of the thing seem rather to favor the presumption as taken in these courts. But the truth is, that in all these matters the legal presumption must grow out of something in evidence before the court; — and in fact a case can hardly by possibility be so destitute of all circumstances as to require a decision upon mere legal presumption, and nothing else. In the case of *Moore and Delatorre*, before the High Court of Delegates, I understand it was clearly held by that court, that whichever way the presumption of revival might be, still the intention was to be collected from all the circumstances of the case." — *Per* SIR JOHN NICHOLL, in *Wilson v. Wilson*, 3 Phillim. 543, 554 (1821).

"This court is founded in holding, under the sanction of the superior court, that the legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a latter, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, *solely* according to facts and circumstances.

¹ The facts are here omitted, and also the opinion of the LORD JUSTICE OF APPEAL BLACKBURNE, concurring with the LORD CHANCELLOR.

ton on the 4th of February, 1858; second, a will of John Newton on the 11th of January, 1859; third, a codicil of the 7th of February, 1859; fourth, a codicil made by the same John Newton on the 16th of February, 1859. These are the four instruments the legal position of which must determine this case.

The facts of the case are few; and, to my apprehension, after very fully considering it, the question is very simple. The will of the 4th of February, 1858, is not now forthcoming. It was destroyed by the testator; and it was found as a fact, by the jury before whom the case was tried, that it had been destroyed before the 16th of February, 1859, that is, before the execution of the codicil of that date. It had been revoked absolutely by an intermediate will, executed on the 24th of April, 1858, which it is only necessary to mention for this purpose, and to which it is not necessary further to allude. The will of the 4th of February, 1858, was absolutely revoked by it, and was in fact destroyed before the 16th of February, 1859. Therefore, if there was nothing else in the case, the decree would be right in affirming that the will of the 11th of February [January], 1859, and the codicil of the 7th of February, 1859, are the last will and testament of John Newton. But we have to consider the effect produced on those three

This, I conceive, is the true principle to be extracted from the judgment of the Court of Delegates in the case of *Moore v. Moore and Metcalf*, 1 Phillim. 375, 466, — a case determined, after an able argument, upon the fullest consideration.

"It is quite unnecessary to inquire what principle would be applicable to a case of this description totally nude of circumstances; as I think it next to impossible that such a case should ever occur. If ever such a case actually does occur, it will be for the court to deal with it, according to the best of its judgment, *pro re nata*. But I can scarcely figure to myself a case either without concomitants; or with these so nicely balanced that neither side prevails. There must always, I think, be circumstances in both scales; and preponderating circumstances either in the one or the other, so as not to leave the case itself, where the law seems to leave it, purely *in equilibrio*." — *Per* SIR JOHN NICHOLL, in *Usticke v. Bawden*, 2 Add. 116, 125, 126 (1824).

"Where the later of two inconsistent wills was [lost or] cancelled, or otherwise revoked by the testator in his lifetime, the effect of such revocation clearly was, according to the old law, to restore the prior will to its original position; and such restored will, if not revoked by any subsequent act of the testator, came into operation at his decease; and the distinction sometimes suggested, between cancelled wills which did, and those which did not, contain express clauses of revocation, in regard to their revoking effect upon an earlier uncanceled will, was wholly without foundation. The clause of revocation, like every other clause, was ambulatory and silent until the death of the testator called the will into operation. In the ecclesiastical court, however, Sir J. Nicholl laid it down, that the legal presumption was neither adverse to nor in favor of the revival of a former uncanceled, upon the cancellation of a later revocatory, will. The question was, he said, open to decision either way, according to facts and circumstances." — 1 *Jarm. Wills* (4th ed.), 136. See 1 *Jarm.* (6th ed.), 120.

In *Neate v. Pickard*, 2 Notes of Cases, 406 (1843), a will was altered, then revoked by marriage, and after marriage revived by a codicil. It was held by SIR H. JENNER FUST that the will was revived as altered.

Under the Wills Act, 7 Wm. IV. & 1 Vict. c. 26, § 22, a will revoked by a later will cannot be revived by destruction of the later will. *Major v. Williams*, 3 Curt. 432 (1848).

documents by the codicil of the 16th of February, 1859; and for that purpose it is necessary to look to the language of that codicil. It is this — "This is a codicil to the last will and testament of John Newton, of Bagnalstown House, in the county of Carlow, Esq., bearing date on or about the 4th day of February, 1858, and which I desire may be considered as annexed to and be taken as part thereof." It then states that, according to the provisions of that will, his nephew, Philip Charles Newton, in case he (the testator) died without issue of his marriage, would become entitled to his estate and to the residue of his personalty; and it then states the reason which the testator had for being dissatisfied with his nephew, but not to such an extent as to induce him absolutely to revoke the devise and bequest in his favor; and it declares that, in the event of his marrying without his knowledge or his written approbation, he revoked the devise and bequest to him, and, in lieu thereof, he gave him a rent-charge; and the codicil then proceeds to dispose of all the testator's real and personal estate, which in that event it was his desire to take from his legatee and devisee Philip Charles Newton, and to give, subject to the same limitations as in the will, to W. C. Newton, and it concludes thus — "In all other respects I confirm my said will, especially that part of it whereby I charge my said estates with the sum of £500 for, and I bequeath the same to, Beauchamp Newton Johnson, and which bequest I hereby repeat and re-affirm."

That codicil is not forthcoming. It was destroyed by the testator, shortly after its execution, and under circumstances which have given rise to some of the questions in the case. But that it was executed, and validly executed as a codicil, no question whatever can be entertained. It was prepared by Mr. Johnson, who was the person with whom was or had been deposited an authentic copy of the will of the 4th of February, 1858. That gentleman retained this copy of the will; he had given the will itself to the testator, and to him the testator went, in order to have prepared the codicil of the 16th of February, 1859.

The first legal position, which seems to me incontrovertible as regards that codicil, is that, by no possible means can the reference made in it to the will of the 4th of February, 1858, be transferred to any other instrument, or (which is the question in the case) be applied to the will of the 11th of January, 1859. I need not read the authorities which have been referred to on this point; it is clear on the facts. I believe, and we all believe, that some great mistake was made in the progress of this transaction, and that Mr. Newton himself thought he was doing one thing when he was really doing another. But the authorities are too strong on the subject; and I must hold, as the court below held, that this codicil of the 16th of February, 1859, belonged exclusively to the will of the 4th of February, 1858, and must be considered as applicable to it, and to it only. The question in the case relates to the effect of it; what is its effect first on the will

of the 4th of February, 1858? The judge below held, and I think rightly held, that the operation of this codicil could not be set up as a document governing and regulating the devolution of the property in the will of the 4th of February, 1858; in other words, he would not read the codicil so as to make it and the will together one instrument. The will itself had been destroyed. It was as if it had never existed. It was no longer *in rerum natura*, and could not, therefore, be incorporated with the codicil. That is the foundation of the judgment of the learned judge on this part of the case; and he clearly expresses his opinion that the operation of the codicil of the 16th of February, 1859, whatever other effect it might have, would not be to revive the will of the 4th of February, 1858. But that is not so much the question as what its effect was on the will of the 11th of January, 1859. The learned judge of the court below held, and we concur with him in that respect, that, apart from other considerations, the simple effect of the codicil of the 16th of February, 1859, if it stood in its integrity, was to revoke the will of the 11th of January, 1859, with its codicil of the 7th of February, 1859. The codicil of the 16th of February, 1859, refers to the will of the 4th of February, 1858, in distinct terms, and professes to confirm the words of that will; and whatever may be its other effect, it plainly declares that, at the time it was executed, the intention of the testator John Newton was, that the will of 1858 should be his will, and, consequently, that the will of 1859 should not be his will. The words of the Lord Justice of Appeal, in his judgment in *Fitzgerald v. Sterling*, 6 Ir. Ch. Rep. 210, are peculiarly applicable to this case. Speaking of a deed, he says — “A deed may be completely inoperative to transfer the property bequeathed, and yet be effectual as a revocation; for it is at least an irrevocable declaration of an intention that the legatee shall not take, though it fails from any cause to transfer the subject-matter to another.” So here this codicil had the effect, in my apprehension, of declaring the clear intention of John Newton, that the will of the 11th of January, 1859, and its codicil of the 7th of February, 1859, should not be his last disposition of his property — that it should go in a different channel altogether; and he indicates what that was to be, by a reference to the will of February, 1858.

It is said that, though that may be so in the abstract, yet there may be circumstances which would qualify the effect of a revoking codicil, in the way suggested at the bar, and adopted in the judgment of the court below. It was said that the object of the codicil was to set up the will of the 4th of February, 1858, and that the consequent revocation of the will of the 11th of February [January], 1859, was coupled with the condition that the legal operation of the codicil should be to revive the will of the 4th of February, 1858; that the revocation was dependent on that effect, and, if that effect failed, in other words, if the will of the 4th of February, 1858, could not be set up, there was no intention of revoking the will of 1859, and that the will of 1859 was

consequently to remain unrevoked, if that which was to be substituted for it failed to take effect; and the learned judge of the court below so held. There is no doubt that certain acts done by a testator, which operate as a revocation or destruction of a will or codicil, may admit of qualification. Cancelling an instrument and destroying it, by burning or otherwise, are acts which depend on the intention with which they are performed; and if they are done under a mistake as to the effect or legal consequence, *e. g.*, where the act is done for the purpose of setting up another instrument, and this other instrument fails in effect, the court will go back to the intention, will qualify the act, and will hold that it was conditional — that it was accomplished for a purpose which has failed, and that it must not have an effect different from and opposed to the intention of the testator. There are many cases in the books to that effect. I shall only refer to one case, *Perrott v. Perrott*, 14 East, 440, which I do not presume to quarrel with, in which the cancellation was completed under a mistake of the effect of that act. But the question which we have to consider here is not how far an equivocal act, depending on intention, is to be controlled, but how far a written instrument, expressly declaring the intention of the party executing it, is controllable, or can be controlled, by parol evidence, in the same way as an act of the testator can be controlled; in other words, whether you can, by parol evidence, engraft upon a written instrument a condition qualifying and making it of no effect, if it should fail in law to carry out the intention of the party. That is a proposition in support of which no authority has been cited. It is, no doubt, laid down that if a man, having made a will in favor of a particular person, forms the belief that that person is dead, and, reciting that fact, makes a new disposition of his property, and it turns out that he was mistaken as to the death of the object of his bounty, the latter disposition is conditional, and of no effect, having been made under a mistake of fact; but, unless the mistake appears on the face of the instrument itself, I know of no case in which it has been held that the effect of the instrument is destroyed; and I find a case in which it was held that the recital in a codicil, not of a fact, but that the legal operation of a former codicil was different (as the testator was advised) from what it really was, would not have the effect of making the latter codicil conditional, and that the court must take the instrument as it stood. The case to which I allude is the case of *The Attorney-General v. Lloyd*, 3 Atk. 551. In that case, a testator made a will, before the Statute of Mortmain, by which he gave particular lands, and his personal estate to be laid out in lands, to charitable uses; and by a codicil, dated the 12th of July, 1756, after the Statute of Mortmain was passed, reciting his will, and the devises of his lands, but that there had been an Act of Parliament entitled the Mortmain Act, and being in doubt whether the devise made by him to such charitable uses would be good or not, and being still desirous, as far as in him lay, to confirm his said will, nevertheless

if. by the Act of Parliament, or by any construction of law thereupon, the estate was not well devised, and could not go to those uses, then and in such case he gave those lands to Millington Buckley, and his heirs. By a second codicil, reciting that, being advised that the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he gave his personal estate to the charitable uses before mentioned, and he gave his real estate to the defendant, Millington Buckley. It was held that the real estate passed by the second codicil, although the testator was mistaken as to the legal operation of the will. Now suppose John Newton had made a codicil in this way, "Being advised that this codicil will revive my will of the 4th of February, 1858, I hereby revoke my will of the 11th of January, 1859."

I apprehend that, on the authority of *The Attorney-General v. Lloyd*, the will of January, 1859, would have been revoked, although the testator was badly advised, and the will of 1858 was not revived. It appears to me that there is a plain distinction between the recital of a fact which turns out to be erroneous, and the recital of advice or opinion, which the testator acts upon. There could be no limit to litigation, if the validity of wills was made to depend on investigations of that character, if the court was to inquire under what advice this will or that codicil was made. We are asked to engraft on this instrument a condition, because the will was made in consequence of erroneous advice given by somebody, or of an erroneous opinion existing in the mind of the testator himself. But we have been referred to no authority for thus construing the codicil. Looking at the case then in that view, we have a testamentary document clearly and distinctly revoking all former wills, and confirming, in express terms, an instrument which the testator meant to incorporate in it. There may have been some mistake; but, on the face of the document, the testator clearly intended to revoke all other wills, except the will of 1858; and there is nothing to control that intention.

I am, therefore, of opinion that the judgment of the court below is erroneous, so far as it declares that the will of January, 1859, was not revoked, — that the effect of the codicil was to revoke that will, and to declare that nothing but the will of 1858, should be the will of the testator; and as that will had been previously destroyed, and could not be incorporated in the codicil, the result is, that we must declare that John Newton died intestate.¹

The Solicitor-General, Mr. Brewster, and Mr. Charles Shaw, in support of the appeal.

Mr. Battersby, Mr. E. Johnston, Mr. J. T. Ball, Mr. J. E. Walshe, Mr. Lloyd, Mr. J. A. Byrne, and Mr. Litton, for different parties, *contra*.

¹ But see *Hule v. Tokelove*, 2 Rob. Ecc. 818 (1850); *Rogers v. Goodenough*, 2 Sw. & Tr. 342 (1862). Cf. *Goods of Steele*, L. R. 1 P. & D. 575 (1868); *Goods of Stedham*, 6 P. D. 205 (1881).

JAMES v. SHRIMPTON.

PROBATE DIVISION. 1876.

[Reported 1 P. D. 431.]

SIR J. HANNEN (President).¹ This case was tried before me, and the following facts were proved: On the 12th of October, 1871, the testator duly executed his will, and on the 3d of July, 1872, he married, whereby his will was revoked. On the same day, and after his marriage, he executed a codicil, in which he made a provision for his wife; and the codicil contained a clause to this effect: "In all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and it is probable that he then destroyed it. The question for my consideration is, whether the destruction of the codicil upon which the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done *animo revocandi*. Where there has been a physical destruction of a testamentary paper the court has often been called upon to form an opinion as to the intention of a deceased at the time he did the act. In this case I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil.

Dr. Spinks, Q. C., and *C. A. Middleton*, for the plaintiffs.

Searle, for the defendants.

PICKENS v. DAVIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[Reported 134 Mass. 252.]

APPEAL from a decree of the Probate Court, allowing the will of Mary Davis. Hearing at May Term, 1881, before *Morton, J.*, who reported the case for the consideration of the full court. The facts appear in the opinion.

¹ Only the opinion is here given.

The case was argued at the bar in October, 1882, and was afterwards submitted on briefs to all the judges.

H. Kingman, for the appellee.

E. Robinson, for the appellant.

C. ALLEN, J. The two questions in this case are, first, whether the cancellation of a will, which was duly executed, and which contained a clause expressly revoking former wills, has the effect, as matter of law, to revive a former will which has not been destroyed, or whether in each instance it is to be regarded as a question of intention, to be collected from all the circumstances of the case; and secondly, if it is to be regarded as a question of intention, whether subsequent oral declarations of the testator are admissible in evidence for the purpose of showing what his intention was. These are open questions in this commonwealth. In *Reid v. Borland*, 14 Mass. 208, the second will was invalid, for want of due attestation. In *Laughton v. Atkins*, 1 Pick. 535, the second will was adjudged to be null and void, as having been procured through undue influence and fraud; and the whole decision went upon the ground that it was never valid, and could not be.

The first of these questions has been much discussed, both in England and America; and it has often been said that the courts of common law and the ecclesiastical courts in England are at variance upon it. See 1 Wms. on Executors (5th Am. ed.) 154-156, where the authorities are cited. The doctrine of the ecclesiastical courts was thus stated in 1824 in *Usticke v. Bowden*, 2 Add. Ecc. 116, 125: "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a later, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, solely according to facts and circumstances." See also *Moore v. Moore*, 1 Phillim. 406; *Wilson v. Wilson*, 3 Phillim. 543, 554; *Hooton v. Head*, 3 Phillim. 26; *Kirkcudbright v. Kirkcudbright*, 1 Hagg. Ecc. 325; *Welch v. Phillips*, 1 Moore P. C. 299. In Powell on Dev. (ed. of 1827) 527, 528, a distinction is taken between the effect of the cancellation of a second will which contains no express clause revoking former wills, and of a will which contains such a clause; and in respect to the latter it is said that, "If a prior will be made, and then a subsequent one expressly revoking the former, in such case, although the first will be left entire, and the second will afterwards cancelled, yet the better opinion seems to be, that the former is not thereby set up again." Jarman's note questions the soundness of the above doctrine (page 529, n.). While this apparent discrepancy in the respective courts remained not fully reconciled, in 1837, the English Statute of Wills was passed, St. 7 Will. IV. & 1 Vict. c. 26, § 22 of which provided, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore

required, and showing an intention to revive the same." Since the enactment of this Statute, the decisions in all the courts have been uniform, that after the execution of a subsequent will which contained an express revocation, or which by reason of inconsistent provisions amounted to an implied revocation, of a former will, such former will would not be revived by the cancellation or destruction of the later one. *Major v. Williams*, 3 Curt. Ecc. 432; *James v. Cohen*, 3 Curt. Ecc. 770, 782; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swatman*, 30 L. J. (N. S.) P. & M. 84; *Wood v. Wood*, L. R. 1 P. & D. 309. In order to have the effect of revocation, it must of course be made to appear that the later will contained a revocatory clause, or provisions which were inconsistent with the former will; and the mere fact of the execution of a subsequent will, without evidence of its contents, has been considered insufficient to amount to a revocation. *Cutto v. Gilbert*, 9 Moore, P. C. 131. See also *Nelson v. McGiffert*, 3 Barb. Ch. 158.

In the United States, there is a like discrepancy in the decisions in different States, though the clear preponderance appears to be in favor of a doctrine substantially like that established in the ecclesiastical courts. This rule was established in Connecticut, in 1821, in *James v. Murvin*, 3 Conn. 576, where it was held that the revocatory clause in the second will, *proprio vigore*, operated instantaneously to effect a revocation, and that the destruction of the second will did not set up the former one; and the like rule was declared to exist in New York, by the Supreme Court of that State, in 1857, in *Simmons v. Simmons*, 26 Barb. 68. The question was greatly considered in Maryland, in 1863, in *Colvin v. Warford*, 20 Md. 357, 391, and the court declared that "a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it." The court further held that the cancellation of a revoking will, *prima facie*, is evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. In *Harwell v. Lively*, 30 Ga. 315, in 1860, a similar rule was laid down, and maintained with great force of reasoning. The opinion of the court concludes with the following pertinent suggestion: "It must be conceded there is much law adverse to the doctrine. . . . Calculated as it is to subserve and enforce the tenor and spirit of our own legislation, and to give to our people the full benefit of the two hundred years' experience of the mother country, as embodied in the late Act, is it not the dictate of wisdom to begin in this State where they have ended in England? We think so." See also *Barksdale v. Hopkins*, 23 Ga. 332. The courts of Mississippi, in 1836, and of Michigan, in 1881, adopted the same rule. *Bohanon v. Walcot*, 1 How. (Miss.) 336; *Scott v. Fink*, 45 Mich. 241. It is to be observed, that some of the foregoing

decisions are put expressly on the ground that the later will contained an express clause of revocation. 45 Mich. 246; 20 Md. 392. An examination of the cases decided in Pennsylvania leads us to infer that a similar rule would probably have been adopted in that State, if the question had been directly presented. *Lawson v. Morrison*, 2 Dall. 286, 290; *Boudinot v. Bradford*, 2 Yeates, 170; s. c. 2 Dall. 266; *Flintham v. Bradford*, 10 Penn. St. 82, 85, 92.

On the other hand, in *Taylor v. Taylor*, 2 Nott & McC. 482, in 1820, it was held in South Carolina that the earlier will revives upon the cancellation of the later one; and the same rule prevails in New Jersey, as is shown by *Randall v. Beatty*, 4 Stew. (N. J.) 643, and cases there cited.

In various States of the Union, Statutes have been enacted substantially to the same effect as the English Statute above cited, showing that wherever, so far as our observation has extended, the subject has been dealt with by legislation, it has been thought wiser and better to provide that an earlier will shall not be revived by the cancellation of a later one. There are, or have been, such Statutes in New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas, and Virginia, and probably in other States. Concerning these Statutes of New York, it is said in 4 Kent Com. 532, that they "have essentially changed the law on the subject of these constructive revocations, and rescued it from the hard operation of those technical rules of which we have complained, and placed it on juster and more rational grounds."

On the whole, the question being an open one in this State, a majority of the court has come to the conclusion that the destruction of the second will in the present case would not have the effect to revive the first, in the absence of evidence to show that such was the intention of the testator. The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators, in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way. In the

absence of any statutory provision to the contrary, we are inclined to the opinion that such intention, if proved to have existed at the time of cancelling the second will, would give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. Under the Statute of England, and of Virginia, and perhaps of other States, such revival cannot be proved in this manner. *Major v. Williams*, and *Dickinson v. Swatman*, above cited; *Rudisill v. Rodes*, 29 Grat. 147. But this results from the express provision of the Statute.

In the present case, there was no evidence tending to show that the testatrix intended to revive the first will; unless the bare fact that the first will had not been destroyed amounted to such evidence. Under the circumstances stated in the report, little weight should be given to that fact. The will was not in the custody of the testatrix, and the evidence tended strongly to show that she supposed it to have been destroyed.

The question, therefore, is not very important, in this case, whether the subsequent declarations of the testatrix were admissible in evidence for the purpose of showing that she did not intend, by her cancellation of the second will, to revive the first; because, in the absence of any affirmative evidence to prove the existence of such intention, the first will could not be admitted to probate. Nevertheless we have considered the question, and are of opinion that such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive, or not to revive, the earlier will. Whether it had the one effect, or the other, depended upon what was in the mind of the testatrix. It would in many instances be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property. On the other hand, they may have been made under such circumstances as to furnish an entirely satisfactory proof of his real purpose. It is true, that it may not be proper to prove the direct act of cancellation, destruction or revocation in this manner. But when there is other evidence of an act of revocation, and when the question of the revival of an earlier will depends upon the intention of the testator, which is to be gathered from facts and circumstances, his declarations, showing such intention, whether prior, contemporaneous, or subsequent, may be proved in evidence.

In the great case of *Sugden v. St. Leonards*, 1 P. D. 154, the question underwent full discussion, in 1876, whether written and oral declarations made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents; and it was decided in the affirmative. It was admitted in

the argument, at one stage of the discussion, that such subsequent declarations would be admissible to rebut a presumption of revocation of the will; but, this being afterwards questioned, it was declared and held, on the greatest consideration, not only that these, but also that declarations as to the contents of the will, were admissible. See pages 174, 198, 200, 214, 215, 219, 220, 225, 227, 228, 240, 241. The case of *Keen v. Keen*, L. R. 3 P. & D. 105, is to the same effect. See also *Gould v. Lakes*, 6 P. D. 1; *Doe v. Allen*, 12 A. & E. 451; *Usticke v. Bowden*, 2 Add. Ecc. 123; *Welch v. Phillips*, 1 Moore P. C. 299; *Whiteley v. King*, 10 Jur. (N. S.) 1079; *Re Johnson's Will*, 40 Conn. 587; *Laroyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; 1 Jarm. Wills (5th Am. ed. by Bigelow), 130, 133, 134, 142, and notes. The question was also discussed, and many cases were cited in *Collagan v. Burns*, 57 Maine, 440, but the court was equally divided in opinion. Many, though not all, of the cases, which at first sight may appear to hold the contrary, will be found on examination to hold merely that the direct fact of revocation cannot be proved by such declarations.

The result is, that, in the opinion of a majority of the court, the will should be disallowed, and the decree of the Probate Court

*Reversed.*¹

¹ See *Williams v. Williams*, 142 Mass. 515 (1886); *In re Noon's Will*, 115 Wis. 299 (1902).

In *James v. Marvin*, 3 Conn. 576 (1821), a later will contained a clause expressly revoking an earlier will. It was held that the cancellation of the later will did not revive the earlier one. HOSMER, C. J., said: "The implied revocation of a will, by one made subsequently, with different devises and bequests, rests on a different foundation. The revocation effected by a will merely, is not instantaneous — but ambulatory, until the death of the testator; for although, by making a second will, the testator intends to revoke the former, yet he may change his intentions, at any time before his death (Pow. Dev. 549); and this was the case of *Goodright d. Glazier v. Glazier*, 4 Burr. 2512. But, a clause of express revocation is something more than a declared intention; it is an act consummated by the execution of the deed or will, in which it is contained, and operating immediately."

After the decision in *James v. Marvin*, the Connecticut Legislature passed a Statute, by which it was provided that "no will or codicil shall be revoked, except by burning, cancelling, tearing or obliterating it by the testator, or by some person in his presence, by his direction, or by a later will or codicil."

In 1880, when this later Statute was in force, a testatrix, who had previously made a will, made another will, which was inconsistent with the former, but which contained no express clause of revocation. This will was not found after the death of the testatrix, but the former will was carefully preserved. The Supreme Court of Errors of Connecticut held that the former will was revived. Referring to *James v. Marvin*, the court says: "In the case cited, the court in fact decided two questions: 1st, that a clause in a will revoking former wills took effect immediately; and 2d, that if the subsequent will contained no such clause, it did not affect former wills until it became operative. The first question was directly before the court, the second was only incidentally involved.

"Now the second question is directly raised, and the first is incidentally involved. In the former case the Statute was not in force; now it is. The Statute comes before us now for the first time for a construction. And it must be remembered that the Statute changes the aspect of the first question. It is not now what it was when *James v.*

MATTER OF CAMPBELL.

COURT OF APPEALS OF NEW YORK. 1902.

[Reported 170 N. Y. 84.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 13, 1901, which affirmed a decree of the Albany County Surrogate's Court admitting to probate a certain instrument as the last will and testament of Ellen Campbell, deceased.

The facts, so far as material, are stated in the opinion.

A. Page Smith for appellant.

Arthur L. Andrews for Archibald Campbell et al., as executors, etc., respondents.

William L. Learned and *John De Witt Peltz* for the Albany Historical and Art Society, respondent.

GRAY, J. This was a proceeding for the probate of a will and of a codicil of Ellen Campbell, deceased, and it therein appeared that she had executed, at different times, and there were existent, two wills and a codicil. On July 6, 1897, one will was executed; on July 19, 1899, another will was executed and on December 7, 1900, an instrument was executed by the testatrix, which declared itself to be a "codicil to the last will and testament of Miss Ellen Campbell, which will bears date July 6, 1897." The will of 1899 modified, or changed, the provisions of the will of July, 1897, in respects relating to legacies given and in giving new legacies. Each of these wills was executed with the requisite statutory formalities and contained the usual revocation clause. The codicil of 1900 modified some provisions of the will of 1897, expressly revoked others and added some legacies. It made no reference to the will of 1899. The will of 1897 and the codicil thereto of 1900 were admitted by the surrogate to probate, as constituting the last will and testament of the deceased; while the will of 1899 was refused probate, as having been revoked. The conclusions of the surrogate in those respects were unanimously affirmed by the

Marvin was decided. Then any written declaration to that effect revoked a will irrespective of any Statute and without regard to the death of the testator. Now the Statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments. Under the Statute it may be claimed, and the claim sustained by very respectable authorities, and supported by reasoning of considerable force, that the will, even though it contain a clause expressly revoking former wills, must take effect as a will before the revoking clause will be operative."

After saying that the doctrine as to the effect of a revoking clause in a will, laid down by Hosmer, C. J., in *James v. Marvin*, has been questioned by Judge Redfield (see 1 Redf. Wills, *328), and that the weight of authority seems to be in accordance with the latter's views, the court comes to the conclusion that, at any rate where there is no express clause of revocation, the mere making of the second will does not, *ipso facto*, revoke the former will. *Peck's Appeal from Probate*, 50 Conn. 562 (1883). And see *Stetson v. Stetson*, 200 Ill. 601 (1903).

Appellate Division and the Home for Aged Men, a legatee under the will of 1899, appeals to this court from the decision below.

Although it is found as a fact by the learned surrogate that the testatrix, by the execution of the codicil in 1900, republished her will of July, 1897; nevertheless, the finding is, in its nature, a legal conclusion from the facts and the question of law is in the case. It is contended, on the part of the appellant, that the statutory provisions with respect to the destruction, cancellation and revocation of a will, are applicable to the present case. (1 R. S. chap. 6, tit. 1, art. 8, sec. 53.) They, clearly, are not. Whether the earlier will was revived by the destruction of a later will is not the question; nor does the validity of testatrix's action with respect to the prior will depend upon verbal declarations, as in the *Matter of Stickney* (161 N. Y. 42). The question is whether the execution by the testatrix of the codicil revived and republished the earlier will of 1897, a completely executed and existent instrument, so that the two instruments, together, constituted the final testamentary disposition of her estate. That such is, generally, the effect of a codicil and that the will thereby republished speaks from the date of the codicil is a proposition settled upon authority. (*Van Cortlandt v. Kip*, 1 Hill, 590; *Brown v. Clark*, 77 N. Y. 369; *Matter of Conway*, 124 ib. 455.) That there intervenes, between the will referred to in the codicil and the codicil itself, another will, executed by the testatrix and, in terms, revoking other wills, does not affect the result; because the codicil to the earlier will implies its existence and effects, impliedly, if not expressly, the revocation of the intermediate will. Of course, there can be no question that the purpose of the testatrix was to re-establish her earlier will; for the title given to the instrument, its subject-matter and the circumstances of its preparation, with the will before her, clearly indicate it. Equally clear, too, should it be that the testatrix purposed the abandonment of her second will. There is no reason in the law why her manifest purpose should not be given effect. The object of the Statute of Wills is to effectuate that which is proved to be the last will of a deceased person. To that end, it prescribes certain formalities of execution, whereby the possibility of imposition, or of fraud, is minimized. When a codicil is executed with those formalities, it is a final testamentary disposition and the will, to which it is shown to be the codicil, if itself an existent and a completed instrument, according to the statute, is taken up and incorporated; so that the two taken together are deemed to, and necessarily do, express the final testamentary intentions. In such a case, it must, logically and manifestly, follow that any other will, or codicil, prior in date to the codicil in probate, is revoked and the presence of express words to that effect, in the codicil, is unnecessary. (See 1 Williams on Executors, [6th Am. ed.] pp. 251-252; 1 Jarm. on Wills, [5th Am. ed.] *pp. 114-191; *Brown v. Clark*, *supra*; *In the Goods of Reynolds*, L. R. [3 Probate & Divorce] 35.)

In *Brown v. Clark*, a married woman executed a codicil, which, in terms, referred to and republished a will executed by her before her marriage, and it was held that it effected a re-establishment and a valid publication of the will, which had been revoked as the effect, under the statute, of the marriage. In the English case cited, *In the Goods of Reynolds*, a will had been executed in 1866, and a codicil to it in 1871. Later, in 1871, another will was executed, revoking all previous wills and codicils. In 1872, a codicil was executed, entitled: "This is a codicil to the will of B. R., dated May, 1866." Probate was decreed of the will of 1866 and of the codicil of 1872, by which it had been revived. The codicil of May, 1871, was held not to be revived, as there was nothing to show such an intention.

I think the judgment below is right and that it should be affirmed, with costs to the respondents, the Albany Historical and Art Society and the executors, to be paid out of the estate.

PARKER, Ch. J., BARTLETT, HAIGHT, CULLEN and WERNER, JJ., concur; O'BRIEN, J., not voting.

Judgment affirmed.¹

¹ See *Goods of Reade*, L. R. [1902] P. 75.

CHAPTER IV.

LAPSED, VOID, AND ADEEMED LEGACIES AND DEVISES.

SECTION I.

LAPSED AND VOID LEGACIES AND DEVISES.

WRIGHT v. HALL.

COMMON PLEAS. 1716.

[*Reported Fort.* 182.]

THE case ss. The testator devised all that his messuage and tenement in Edmonton to Francis Carter and his heirs, and all the rest and residue of his messuages, lands, tenements and hereditaments in Edmonton, Enfield, and elsewhere, to John Lammas, his heirs and assigns forever.

After the making this will, the aforesaid Francis Carter, the devisee, died in the lifetime of the testator, so that this became a lapsed devise by his death; and then the sole question in ejectment was, Whether this latter clause of the will would carry over the lapsed devise to John Lammas, the residuary devisee, or whether it should descend to the heir at law of the testator?

It was admitted, that such a residuary clause would carry over a lapsed legacy¹ to a residuary legatee from an executor; but the doubt was, whether it would carry it from the heir at law.

Those who argued that it would not, cited many authorities in the books, where 'tis expressly adjudged, that an heir at law shall not be disinherited, but by very plain and clear words, or by some necessary implication from express words, which show, that the testator did intend to disinherit him.

The court held, that the devise of all the rest and residue of my messuages, lands, &c. did not convey what was expressly devised before: for wills must be construed from the intent of the testator at the time of making the will, which appears to be to give his whole estate to Carter and his heirs, in that messuage; and at the time of the will made, he had no rest and residue left in that house, and the devise to Carter being void, the house will go to the heir at law, and not to John Lammas.

¹ So also a void legacy. *Wood's Estate*, 209 Pa. 16 (1904).

This was the authority and foundation of another case which was of the same nature; viz. that the *rest and residue of my lands undevise*d must be meant at the time of making the will; and this was the case of *Roe and Fludd*, Pasch. 2 Geo. 2. [Fort. 184.]¹

BAGWELL v. DRY.

CHANCERY. 1721.

[Reported 1 P. Wms. 700.]

J. S. INTER AL' bequeathed the surplus of his personal estate unto four persons equally to be divided between them share and share alike, and made A. B. his executor in trust. One of the four residuary legatees died in the life of the testator, after which the testator died; and the question being, to whom the fourth part devised to the residuary legatee (who died in the life of the testator) should belong?

THE LORD CHANCELLOR [MACCLESFIELD], after time taken to consider of it, did this day deliver his opinion, that the testator having devised his *residuum* in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common, and the death of the fourth residuary legatee could not avail them, as it would have done, had they been all joint legatees, for then the share of the legatee dying in the life of the testator, would have gone to the survivors. But here the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them.

His Lordship further declared, that this share could not go to the executor, he being but a bare executor in trust, and consequently, that it must belong to the testator's next of kin, according to the Statute of

¹ See *Doe d. Morris v. Underdown*, Willes, 293 (1741).

In *Cambridge v. Rous*, 8 Ves. 12 (1802), SIR WILLIAM GRANT, M. R., said, p. 25: "It has been long settled, that a residuary bequest of personal estate (for it is otherwise as to real) carries, not only every thing not disposed of, but every thing, that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean, that the residuary legatee should take what is given from him: no; for he does not contemplate the case: the residuary legatee is to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estate the heir at law takes; but in the case of personal property the residuary legatee is preferred either to the next of kin or the executor." *Batchelder, Petitioner*, 147 Mass. 465 (1888), *accord*. See also *In re Isaac*, L. R. [1905] 1 Ch. 427. Cf. *In re Fraser*, L. R. [1904] 1 Ch. 726.

Distribution, as so much of the personal estate remaining undisposed of by the will, and that as to this, the executor was a trustee for such next of kin.¹

VINER v. FRANCIS.

CHANCERY. 1789.

[Reported 2 Cox, 190.]

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington £6,000 in trust *for the use and benefit of his children*, to be equally divided between them, either in his lifetime or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby £3,000, the interest of which he gave to her for her own use during her life; and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, "*Item*, I give unto the children of my late sister Mary Crowser, the sum of £2,000 to be equally divided among them. Note, To the above three legacies I desire £100 may be paid to each within one month after my decease, to buy mourning, &c." And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: "I give unto my brother Samuel Wiggington one third of the residue, and one third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother Samuel Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser."

At the date of the will there were three children of Mary Crowser living, viz. John, Elizabeth, and William. William died *after the date of the will*, in the lifetime of the testator; and it was contended that one third of one third of the £2,000 given to the children of Mary Crowser lapsed into residue, and that one third of the residue lapsed, and was payable to the next of kin, as undisposed of.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once indeed thought that a bequest to "the children of A." might extend to *all* children born at any future time; but *Derisme v. Mello*, 1 Brown. Cha. Rep. 537, has settled that such children shall take, as are born at the time the distribution of the fund is to take

¹ If there is a bequest of the residue to a class, and one member of the class dies before the testator, the survivors take the whole of the residue. For cases in which the bequest has been construed as being to a class, see *In re Jackson*, L. R. 25 Ch. D. 162 (1883); *Chase v. Peckham*, 17 R. I. 385 (1891). Cf. *Dildine v. Dildine*, 32 N. J. Eq. 78 (1880); *Moffett v. Elmendorf*, 152 N. Y. 475 (1897).

See *Valdez's Trust*, L. R. 40 Ch. D. 159 (1888).

place. The doubt in this case arises on the clause which gives "to the children of my late sister Mary Crowser" the sum of £2,000 to be equally divided. As I said before, the general rule as settled by *Derisme v. Mello* is, that the children *living at the time of the distribution of the fund*, shall take; if it is to be distributed at the time of the testator's death, then such children as shall be *then* living; if distributable at the death of some *other* person, then the testator is to be supposed to mean such children as shall be living at the time of the death of such other person. Then the question is, whether a gift to the children of *his late sister* Mary Crowser is or is not indicative of an intention different from that which would be imputed to him under the general rule, that is, whether he meant the *particular* children living at the time he made his will, to take the fund equally between them, or whether it was not the same thing as if he had given the £2,000 "to the *three* children of my late sister;" for in that case it would have been a legacy to three *personæ designatæ*. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death. If so, why should I suppose that the *sister being dead*, he meant anything else than what would be imputed to him in the other case? This is not like the case of *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96, for there the gift is to the *five* grandchildren, which shows that he had *particular* objects in view. But the general rule, I take it, comes to this, to *exclude* all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator.¹

LLOYD v. LLOYD.

CHANCERY. 1841.

[Reported 4 Beav. 231.]

THE testatrix gave all her residuary personal estate, after payment thereof of all her just debts, legacies, and expenses attending thereon, upon trust to divide the residue thereof into three equal parts or shares; and as to one equal third part of such residue, upon trust to pay or transfer the same unto her son John Lloyd, his executors, administrators, or assigns, for his and their own use and benefit. And as to one other equal third part thereof, upon trust that they, her said trustees, &c., should, within the space of six calendar months next after her decease, pay unto her son Charles Lloyd the sum of £500, part thereof,

¹ See *Dimond v. Bostock*, L. R. 10 Ch. App. 358 (1875); *Re Allen*, 44 L. T. N. S. 240 (1881); *Jackson v. Roberts*, 14 Gray, 546 (Mass. 1800). Cf. *Dowset v. Sweet*, Amb. 175 (1753).

to and for his own sole and absolute use and benefit; and as to the residue and remainder of such last-mentioned one third part, upon trust for Charles Lloyd for life, with remainder to his children; and as to the remaining one third part of such residue of her estate, she gave the same to her daughter Charlotte Hodgkinson for life, with remainder to her children.

Charles Lloyd died in the lifetime of the testatrix, leaving children, and the question was to whom the £500 belonged.

Mr. Pemberton and *Mr. K. Parker* for the plaintiffs, the children of Charles Lloyd.

Mr. Rogers, contra.

Mr. Tennant, for the children of Charlotte Hodgkinson.

THE MASTER OF THE ROLLS. [LORD LANGDALE.] In this case of *Lloyd v. Lloyd*, I have looked over the case of *Skrymsher v. Northcote*, 1 Swan. 566, and I confess that I am not able to find that there is any substantial difference between that case and the present.

In that case the testator gave to each of his daughters a life interest in his residuary estate, with remainder to their children; making, in the event of there being children, an absolute severance of the fund. And he directed, that if either of the daughters died without children, £500 should be paid, out of the moiety of the residue given to her and her children, to H. N.; and the remainder of that moiety was to go over to the other sister, subject to the same limitations. The testator revoked the gift of the £500, and the event on which it had been given having happened, the question was, whether it was to go to the other residuary legatee, or to the next of kin; and Sir Thomas Plumer considered, that although where a legacy failed, it inured to the benefit of the residuary legatee, yet "that a part of a residue, of which the disposition failed, would not accrue in augmentation of the remaining portion as a residue of a residue, but, instead of resuming the nature of residue, devolved as undisposed of;" and in that case he determined that the £500 must go to the next of kin. He considered that there was a subdivision made of that moiety of the residue, and that the sum given out of it was a portion of the residue, which neither went to the other residuary legatee, nor to any other person, but had lapsed for the benefit of the next of kin.

In this case the testatrix has given her residue, and directed it to be divided into three equal portions. One portion she gave to one person absolutely. As to the second portion, she gave £500 out of it to the father of the children who were intended to have the remainder after his death; and then she gave the remainder of the third part of the residue to the father for his life, with remainder to his children; and the other third she gave to another branch of the family.

The question in this case is, what is to become of the £500, the gift of which has failed by the death of the legatee in the lifetime of the testatrix. I am satisfied that if she had contemplated the event which

happened, namely, the death of that person in her lifetime, she would have given the whole of the share of the residue to his children, in the way she had given the remainder. But looking at the decision in the case before Sir Thomas Plumer, that there is a difference between a legacy and a legacy given out of a share of the residue, I must consider the £500 as a portion of the one third share of the residue, and as a mere subdivision of it, and that it belongs to the next of kin as undisposed of.¹

GREENE v. DENNIS.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1826.

[Reported 6 Conn. 292.]

EJECTMENT ² for land in Pomfret. Trial before *Bristol, J.*

The plaintiffs claimed title as heirs of Sylvester Wickes; the defendant claimed under a lease from the Yearly Meeting of the people called Quakers, and also under a lease from Rowland Greene. The defendant put in evidence the will of said Wickes, dated in 1822. By this will the testator devised the *locus* to the Yearly Meeting of the people called Quakers, of New England, and after numerous other devises and bequests, he disposed of the residue thus: "Also I give to my said nephew Rowland Greene, all the rest and residue of my estate, of what kind or nature it may be, or wherever found, not herein or otherwise disposed of, on condition that he, the said Rowland, pay, or cause to be paid, all my just debts, the foregoing legacies, funeral charges, and the expense of settling my estate."

The judge ruled that if the devise to the Yearly Meeting was void, the land descended to the heir; the jury returned a verdict for the plaintiffs, and the defendant moved for a new trial on the ground of a misdirection.

Cleaveland and Johnson, in support of the motion.*Goddard and H. Strong*, contra.

HOSMER, C. J. [gave the opinion of the court. It was *held* that the members of the Yearly Meeting could not take and hold the land as individuals; that the Yearly Meeting was not a corporation; and that therefore the devise was void. The opinion continued thus:] It remains for consideration, the devise in question to the Yearly Meeting being void, whether the lands demanded, descended to the heirs-at-law of devisor, or were transferred to the residuary devisee.

In relation to real estate, it is an established principle, that in case of a lapsed devise, the estate does not vest in the residuary devisee, but descends to the heir-at-law of the testator. Wills must be con-

¹ See *Green v. Pertwee*, 5 Hare, 249 (1846); *Beekman v. Bonsor*, 23 N. Y. 298, 312 (1861). Cf. *Prison Association v. Russell*, 103 Va. 563 (1905).

² The following statement is substituted for that in the report.

strued by the intent of the devisor, at *the time of making them*. Of consequence, when property is given to a person incapable of taking, and there is a general devise of the residue; so far as respects the estate specifically devised, at the time of the will's being made, there is an intentional disposition; and it never was designed, that it should fall into the *residuum*. The law respecting the bequest of personal estate, is different; but as to the realty, the decisions have been uniform and unquestioned. *Wright v. Hall*, Fortes. 82; *Roe v. Fludd*, Fortes. 182; *Doe d. Morris et al. v. Underdown*, Willes, 293; *Watson et al. v. Earl of Lincoln et al.*, Amb. 338, 9; *Attorney-General v. Johnstone*, Amb. 580; *Gravenor v. Hallum*, Amb. 643, 645, 2 Madd. Ch. 81. The case of *Crane v. Crane*, 2 Root, 487, scarcely requires being mentioned, by way of exception, as it was little discussed, and without the citation of any authority.

The other judges were of the same opinion.

*New trial not to be granted.*¹

DOE d. FERGUSON v. HEDGES.

SUPERIOR COURT OF DELAWARE. 1835.

[Reported 1 Harring. 524.]

CLAYTON, C. J.² Mary James being seised in fee of the premises in question by her will duly executed, dated 30th July, 1831, gave and devised to "Saint Andrew's Church in Wilmington, all a certain lot of land therein described, to have and to hold the use of the said house and lot to the said church forever; but not to be sold on any account whatever." And after bequeathing sundry legacies, there is this clause in her will: "Item, I give, bequeath and devise to William Ball and Mary Ball, children of James Ball, deceased; and to John McKnight all the residue of my estate real and personal of whatever kind it may be." The lessors of the plaintiff are the residuary devisees.

It is not contended in this case that the devise to Saint Andrew's Church, passes any estate in the premises in question to the church; but it is admitted that the devise is void by the laws of this State. That question was decided at the last May Term in Kent, in the *State, Use of Wiltbank et al. v. Bates*. The question here is, who take? the heirs-at-law of Mrs. James, or her residuary devisees?

Since the case of *Doe on the demise of Morris v. Underdown*, Willes, 293, that question seems to be completely settled in England. In that case the distinction, as far as we can ascertain, was first established

¹ See, accord, *Lingan v. Carroll*, 8 H. & McH. 383 (Md. 1793); *Tongue v. Nutwell*, 18 Md. 415, 427, 428 (1859); *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 600 (N. Y. 1837), affirmed 20 Wend. 457.

² The opinion only is given.

between a lapsed devise, and a void devise. The principles laid down by the Chief Justice in that case were these: that the intent of the testator ought always to be taken as things stood at the making of his will, and is not to be collected from subsequent accidents which the testator could not then foresee; and that when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die *immediately* nothing remains undisposed of, he cannot intend to give anything in these lands to the residuary devisee. This latter rule would govern all cases of lapsed devises; for if the testator were to die immediately upon the making of the will there would be nothing undisposed of, and the devisee would take; but if the devisee were to die between the making of the will, and the death of the testator, the devise would lapse and the heir-at-law would necessarily take in preference to the residuary devisee, for it was not undisposed of *at the making* of the will, but the devise was rendered inoperative by a subsequent accident — the death of the devisee. This is not so in the case of a void devise; for there at the making of the will nothing passes, nothing is disposed of, and the residuary devisee under the clause "all the residue of my estate" takes, and not the heir-at-law. In *Doe, Lessee of Stewart v. Sheffield*, 13 East, 526, this is considered as the settled law; and in *Doe on the demise of Wells and Others v. Scott and Another*, 3 Maule & Sel. 300, Lord Ellenborough in delivering the judgment of the court recognizes the authority of the two preceding cases as "admitted law" on the subject.

We are not unaware of the American decisions on this subject in 6 Conn. Rep. 292, and in *Lingan v. Carroll*, 3 Har. & McHen. 333; but we prefer following the authorities which we have cited. The heirs-at-law do not appear to have been objects of the testator's bounty; they are nowhere mentioned in her will. This circumstance is not relied on in forming our judgment, but merely to show that the testatrix did not desire that her heirs-at-law should derive any benefit from her estate. Our decision is founded upon the authorities which we have cited, and upon the principles established by them. Our opinion is therefore for the residuary devisees, and judgment is accordingly given for the plaintiffs in the case of the *Lessee of McKnight and Others v. Hedges*; and in the other case, lessee of J. Ferguson and others, the heirs-at-law of Mary James, against the same defendant, that judgment be given for the defendant.¹

Macbeth and Wales, for the heirs-at-law.

Gray and Read, Jr., for the residuary devisees.

Booth and J. A. Bayard, for the church.

¹ See *Hayden v. Stoughton*, 5 Pick. 528, 536, 537 (Mass. 1827).

MOLINEAUX v. RAYNOLDS.

COURT OF CHANCERY OF NEW JERSEY. 1896.

[Reported 55 N. J. Eq. 187.]

REED, V. C.¹

Charles T. Reynolds died, leaving a will by which he left of this property thirty-six hundredths to his son Edward H., thirty-two hundredths to his son Charles T., and thirty-two hundredths to Edward H., as trustee for his son William W. His son Charles T. died before his father, and the question is whether his share passed to Mrs. Adelaide Reynolds under the residuary clause of the will, or whether it was undisposed of by the will, and so passed to the two sons as heirs-at-law of their father.

The two sons, in their own right, make no claim to any interest in their deceased brother's share, but the wives of the two sons claim an inchoate right of dower in the same, grounded upon what they claim to be the legal estate of their respective husbands as heirs-at-law. Mary S. is the wife of Edward H., and Mattie C. is the wife of William W. Reynolds. At common law, whenever a devise lapsed by the death of the devisee, before the death of the testator, the property passed to the heirs-at-law, while lapsed legacies, instead of passing to the next of kin, fell in the residuum, and so passed, under a will, to the residuary legatees. This distinction between the course taken, under the same condition of affairs, by lapsed devises and lapsed legacies, seems to have sprung from the fact that no real estate acquired by the testator, after the execution of his will, passed under the residuary clause, while such a clause included all personal property owned by the testator at the time of his death not otherwise given, no matter when acquired.

Now, by our statute of wills, these instruments become operative upon real property acquired after, as well as before, the date of the execution of the will. Rev. p. 1248. By this act devises and legacies are put upon the same footing, and it would seem that inasmuch as the residuary clause carries all the personalty left undisposed of by other parts of the will, the same should naturally be its effect in regard to realty. Similar statutes in other states have been judicially declared to extinguish all difference between lapsed legacies and lapsed devises, in this particular, and that both pass into the residuum in default of a contrary intention manifested on the face of the will.

This is the law of this state. In *Executors of Shreve v. Shreve*, 2 Stock. 385, Chancellor Williamson suggests the query whether the statute did not abolish the distinction between real and personal property in the particular mentioned; and in *Smith v. Curtis*, 5 Dutch. 345, it was expressly held by the supreme court that the rule upon which the distinction between lapsed legacies and lapsed devises had arisen

¹ Only a portion of the opinion is given.

should not be kept up, as the reason upon which the rule rested had been removed. It was held, in that case, that a lapsed devise passed into the residuum.

Under the doctrine laid down in this case, the share of Charles T. passed to Mrs. Adelaide Raynolds under the residuary clause of the will.¹

NOTE.—In *Stevens v. King*, L. R. [1904] 2 Ch. 80, FARWELL, J., said, p. 33: "If the court finds, upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse."

SECTION II.

ADEMPMENT.

A. *Revocation of Devises by Conveyance.*

AMETRANO v. DOWNS.

COURT OF APPEALS OF NEW YORK. 1902.

[Reported 170 N. Y. 388.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 12, 1901, affirming a judgment of the Special Term construing the will of Margaret Shelley, deceased.

The facts, so far as material, are stated in the opinion.

John M. Rider for appellant.

Alfred D. Lind and *Joseph Kaufmann* for respondents.

CULLEN, J. On August 7th, 1884, Margaret Shelley, now deceased, received by conveyance from her husband through an intermediary an undivided one-half in the premises known as number 22 Oliver street, in the city of New York. On March 12th, 1891, she executed the following will:

"I, Margaret Shelley, of the City, County and State of New York, being of sound disposing mind and memory, do hereby make, publish and declare this to be my last will and testament.

"*First.* I order and direct my funeral expenses to be paid as soon as shall be convenient after my decease.

"*Second.* I give, devise and bequeath my one-half interest in the

¹ See, accord, *Thayer v. Wellington*, 9 All. 283, 295 (Mass. 1864); *Reeves v. Reeves*, 5 Lea, 658 (Tenn. 1888); *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 864 (1889). Contra, *Minssey's Appeal*, 88 Pa. 470 (1879); *Rizer v. Perry*, 58 Md. 112, 184 (1881).

building known as number twenty-two (22) Oliver street, in the Fourth Ward of the City of New York, unto my daughter Lizzie, wife of Emanuel Amotrono, of the City of Brooklyn, County of Kings, State of New York, and to her heirs and assigns forever.

"I nominate, constitute and appoint Patrick J. Murphy, of the City of New York, and Charles Henry Hawkins, of the same place, or either of them, as executor of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-one."

In 1896 condemnation proceedings were taken by the city of New York to acquire said number 22 Oliver street as a site for the erection of a school house. To these proceedings Margaret Shelley was not made a party. The net amount of the award after the satisfaction of the incumbrances on the property, amounting to \$9,800, was in February, 1897, paid to her husband, Michael Shelley, who thereupon deposited one-half of the award, \$4,900, in the Washington Trust Company to the credit of his wife as her share of the property. In 1898 Margaret Shelley drew the accrued interest on the deposit and \$400 on account of the principal. She died in February, 1899, leaving an estate consisting entirely of personalty. The plaintiff is the devisee named in the will as well as the administrator of the estate of the deceased, and in this action which is for a settlement of her accounts, claims that she is entitled under the will to the fund received by the testator in the condemnation. She has been defeated in this claim by both the courts below and now appeals to this court.

The able opinion of the learned Appellate Division deals so fully with the question in dispute that there remains but little to be added by us. Had the deceased voluntarily alienated her property by deed it is entirely clear, under the authorities in this state, that the devisee would have no claim to the proceeds of the sale. (*Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 35; *Gilbert v. Gilbert*, Id. 532; *Vandemark v. Vandemark*, 26 Id. 416; *Philson v. Moore*, 23 Hun, 152; *McNaughton v. McNaughton*, 34 N. Y. 201.) "If a testatrix devises real estate and sells the same before the will takes effect, the proceeds of the sale will become personal estate, and no court can substitute the money received by the testatrix for the land devised." In *Adams v. Winne* (*supra*) and *Beck v. McGillis* (*supra*) the testator had taken back a mortgage on the devised land as security for the purchase money, yet it was held that the devisee was not entitled to the mortgage. The only point to be considered therefore, is whether a different rule obtains in the case of involuntary alienation, by operation of law, from that which prevails on a voluntary sale. Mr. Jarman asserts that the rule is the same in both cases, and the English decisions cited by him sustain the doctrine of the text. (Jarman on Wills, p. 163.)

We see no such difference between a voluntary and an involuntary

sale of the devised land as justifies a distinction in principle in the application of the rule that where the testator has parted with the subject of the devise, all claim of the devisee is lost. While there is no authority on the point in this state (there is said to be none in the country), the question presented is not without analogy in the rule which determines in cases of intestacy the character of the proceeds of sales by operation of law, whether they are to be considered as real or personal property. It is settled by a number of authorities that if the sale be made by execution or judicial decree in the lifetime of the intestate the proceeds are personalty and go to the next of kin, while if made after his death they are real estate and go to the heirs at law (*Graham v. Dickinson*, 3 Barb. Ch. 169; *Denham v. Cornell*, 67 N. Y. 556), except where the property belongs to an infant or to an incompetent person, in which case the proceeds retain their original character of realty. (*Sweeney v. Thayer*, 1 Duer, 286; *Horton v. McCoy*, 47 N. Y. 21.)

It is urged by the learned counsel for the appellant that the condemnation proceedings did not effect the revocation of the will, because there was no "other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed" (2 R. S. 64, § 42), nor any settlement, deed or other act by the testator (§ 47). It may be conceded that there was no revocation of Mrs. Shelley's will, though I very much doubt whether the deceased was not divested of title by her own voluntary act. As she was not a party to the condemnation proceedings they were without force or effect as to her. If she lost her title it was because, by her voluntary acceptance of the award, she estopped herself from claiming the property. Be this as it may, the case does not fall within the Statute of Wills. A specific devise or specific legacy may not be revoked, but unless the property devised or the thing bequeathed is found in the estate of the testator at the time of his decease the will is, necessarily, inoperative. The testatrix could not devise to the appellant an undivided half of the premises number 22 Oliver street, for she did not own it at her decease, and the question here presented is not whether the devisee shall receive the property devised, but whether she shall receive the fund which proceeded from the condemnation of that property. With this latter question the Statute of Wills does not deal. It does not provide affirmatively that a conveyance or other disposition of bequeathed or devised property shall render the will in that respect ineffective; it assumes that principle, and in sections 45, 46 and 47 merely limits the operation of the rule by providing that in three cases, to wit, an executory contract, an incumbrance or mortgage and a conveyance or deed altering the testator's estate, but not wholly divesting his title, the devise shall be revoked only *pro tanto*. As said by the chancellor in *Adams v. Winne* (*supra*) it left unchanged the existing law "that when the testator had converted real estate, which he had devised as such, into personalty,

or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of the will or an ademption of the bequest." The correctness of this doctrine has never been challenged.

The judgment appealed from should be affirmed, with costs to both parties payable out of the estate.

BARTLETT, MARTIN, VANN and WERNER, JJ., concur; PARKER, Ch. J., and HAIGHT, J., take no part.

*Judgment affirmed.*¹

B. *Ademption of Specific Legacies.*

PARTRIDGE v. PARTRIDGE.

CHANCERY. 1736.

[*Reported Cas. temp. Talb.* 226.]

THE testator by his will devised £1,000 capital South Sea stock to his wife for life, for her sole use and benefit, with power to dispose of the same to such of her children as she should think fit. At the time of making his will he was possessed of £1,800 South Sea stock: he afterwards reduced such stock to £200, but after that purchased as much as made up the £200 to be £1,600, and afterwards died in July, 1733. In June next before his death the Act took place for changing three fourths of the capital South Sea stock into annuities. The questions made upon this case were, first, whether the testator selling £1,000 part of his £1,800 South Sea stock, after the making his will, should not be considered as an ademption of the legacy. If not, secondly, if the Act for turning South Sea stock into annuities should not be so considered. In the argument of this case the case of *Ashton and Ashton*, *Cas. Temp. Talb.* 152; 3 P. Will. 384, was cited, where the testator

¹ It was formerly essential to the validity of a devise that the testator should own the land devised at the date of the will and should continue to own it until his death. The devise was revoked if the testator parted with the ownership even though he subsequently regained it. Thus where A devised his estate in fee, and subsequently conveyed the estate to the use of himself and his heirs until he should marry, and then over, and died before marriage, the devise was held to be revoked. *Earl of Lincoln's Case*, *Freem. C. C.* 202 (1695). Cf. *Perkins v. Walker* (a mortgage), 1 Vern. 97 (1682); *Luther v. Kidby* (a partition by tenants in common), 3 P. Wms. 169, note (1752). See 1 Jarman, *Wills* (4th ed.) 147-167; *Walton v. Walton*, 7 Johns. Ch. 258 (N. Y. 1828). This is no longer law owing to the statutory provisions in England and the United States by force of which a will passes after acquired realty.

A devise is revoked in equity by a contract to sell the land. The devisee must convey to the purchaser and the purchase money goes, not to the devisee, but to the personal representative of the testator. See Ames, *Cases in Equity Jurisdiction*, Vol. I, page 195, and note. By statute in several of the United States, the purchase money goes to the devisee. 1 Woerner, *Am. Law Adm.* (2d ed.) § 53. See also *Miller v. Malone*, 109 Ky. 188 (1900).

devised £6,000 South Sea stock to J. C., and at the time of his death and will was possessed of only £5,500 South Sea stock; upon which a bill was brought against the executor to have it made up £6,000. But the Master of the Rolls, and after him the Lord Chancellor, on appeal, were of opinion the deficiency should not be supplied, upon this principle, that, as general legatees have no lien on what is given to specific legatees, so a specific legatee shall have no lien on the general fund of the testator; but if any loss happens to what is specifically given to him, he must bear the burden thereof himself.

LORD CHANCELLOR [TALBOT]. All cases of ademption of legacies arise from a supposed alteration of the intention of the testator; and if the selling out the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much particular stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in the case at bar, to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again. As to the second point, after such devise, the Legislature thought proper to make a law to change three fourths of the stock into annuities, and the fourth to remain as it stood before; so that the testator, when he died, was possessed of £1,200 annuities, and £400 stock; and it would be extremely hard to say, that this alteration of the stock by Parliament should work an ademption, when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do.¹

If an obligee was to devise a legacy of £1,000 secured by bond from A. B., and he should afterwards compel A. B. by due course of law to pay it him, this would be an ademption of the legacy; but it was never thought, if A. B. should pay in the money voluntarily, it would be an ademption, because the obligee is bound to receive it.

¹ See *Oakes v. Oakes*, 9 Hare, 606 (1852).

DINGWELL v. ASKEW.

CHANCERY. 1788.

[Reported 1 Cox, 427.]

CERTAIN quantities of stock were previously to a marriage vested in the names of trustees, and were upon the marriage settled to the separate use of the wife for her life, then to the issue of the marriage, then to such persons as the wife should by will appoint, and in default thereof to the wife absolutely; and in the settlement a very full and ample power was given to the wife to make a will notwithstanding her coverture, and to dispose of this property as she should think fit. The wife made a will during coverture, in which she recited the power she had under the settlement, and in pursuance of that power she disposed of the stock, and then the husband died in her lifetime without issue. After the death of the husband the wife took a transfer of the stock from the trustees into her own name; and died without making any other will than as aforesaid. And the question was, whether the calling in the stock from the trustees should be a revocation or an ademption of the bequest.

It was argued to be a revocation or ademption on the ground that by the transfer the wife acquired to herself a new estate or interest in this fund from that which she had at the time of making her will, and upon which that will operated; that the same presumption would be raised in this case, as where a man makes a will of land, and afterwards by feoffment or otherwise takes a new estate in the same land to himself, and precisely for the same interest as he had in it before, yet such feoffment will work a revocation. The interest which she acquired by the transfer was very different from that limited to her by the settlement, and the specific subject of her bequest was therefore gone at the time of her death.

MASTER OF THE ROLLS. [SIR LLOYD KENYON.] This case is new *in specie*, but I have very little doubt about the grounds on which I am to decide it. If it could be proved, that when the wife took the transfer, her intention was altered, it would decide the question; but there is no such thing in proof here; and if I were to hazard conjecture on the subject, which I am not inclined to do, I should think her intention remained the same. Under the settlement she had a power of disposing of this property beneficially by will. The property was then in trustees, which was necessary for securing it from the control of the husband; but the instant the husband died, the reason for vesting it in the trustees ceased; her interest in it after the transfer was not in fact more beneficial, but only more convenient to her, which however was a sufficient reason for her to wish to get rid of the intervention of the trustees. It has been decided that where a person, having an equitable interest in real property, devises it, and afterwards gets the legal estate, this will be no revocation. So here there is no new beneficial interest

acquired. If therefore we were to construe this with equal strictness as the rules respecting real estate, it would be no revocation; much less so in case of personalty. I am therefore very clearly of opinion, though I know no case in point, that this property will pass by this will.

STANLEY v. POTTER.

CHANCERY. 1789.

, [Reported 2 Cox, 180.]

EDWARD STANLEY, by his will of the 29th day of Oct. 1777, reciting that some time in or about the month of Jan. 1772, he the said testator had advanced and lent unto James Campbell, of Craignash, in Scotland, the principal sum of £2,000 sterling, and for securing the repayment thereof, with interest at five per cent per annum, or an annual rent of £100 sterling, with liquidate penalty, expenses of enfeoffment, and *termly failzies*, the said James Campbell did duly execute to him the said testator his the said James Campbell's certain heritable bond, bearing date the 27th day of January 1772, and thereby and by a ratification thereof by Mrs. Ann Campbell, wife of the said James Campbell, bearing date the 12th day of February 1772, and instrument of sasine taken upon the said heritable bond, dated the 27th day of January 1772, divers lands, islands, and other hereditaments and premises were and stood charged with the due payment of the said principal sum of £2,000 and interest, or annual rent of £100 for the same in manner therein mentioned, he the said testator gave and devised that all the said annual rent of £100 sterling, or such annual rent, less or more, as by the law for the time being should correspond to the said principal sum of £2,000 to be taken as afore-mentioned, and all the said lands and premises for and in real security, and more sure payment of the said £2,000 sterling &c. and all his estate, right, title, and interest therein to the several uses, and upon and for the several trusts, intents, and purposes thereafter mentioned (that is to say), to the use and behoof of John Latham and Thomas Potter, their executors, administrators and assigns, for and during the term of 99 years, in case his the said testator's daughter Anne Stanley should so long live, upon the trusts, and to and for the intents and purposes thereafter mentioned and expressed concerning the same, and from and immediately after the expiration of the said term, and in the mean time subject thereto, to the use and behoof of George James Stanley for life, &c. with divers limitations over. And in case the said sum of £2,000 should at any time thereafter be paid off and discharged, then the said testator did will, order, and direct that the same should be paid unto and received by the said John Latham and Thomas Potter, or the survivor, &c. and the said testator did thereby will and direct that they his said trustees

should, as soon as conveniently might be after the receipt thereof, lay out and invest the same in the purchase of freehold lands, tenements, and hereditaments, to be settled and conveyed to and upon the same uses, trusts, and purposes, as thereinbefore limited and declared concerning the said annual rent and premises aforesaid; and in the mean time and until such purchase could be had, he directed that the said sum of £2,000 should be laid out and invested by his said trustees in government securities, and the dividends thereof should be paid to such person or persons as would be entitled to the rents of such lands if purchased.

In the year 1786 James Campbell paid off the debt of £2,000 to the testator; but the testator left his will unaltered in respect of the bequest of the £2,000 and died in the month of January 1789. There being no particular circumstances in the case respecting the mode in which this debt was paid off, or the appropriation of the money by the testator in his lifetime, the question now was whether this bequest was not adeemed by the debt being paid to the testator before his death.

Lloyd, in support of the bequest.

LORD CHANCELLOR [THURLOW]. When the case of *Ashburner v. Macquire* [2 Bro. C. C. 108] was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. And I do not think that the question in these cases turns on the intention of the testator. The idea of proceeding on the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground. As to the case of *Attorney-General v. Parkin*, [Ambl. 566], I collect from the note I read of that case, that Lord Camden would have had great difficulty in making those legacies contributory in the event of a deficiency of assets; and if so, I cannot conceive how they are to be taken as general legacies for any other purpose; they must have had all the consequences of general legacies, or none; they could not be specific to one purpose, and general to another. This I cannot understand. And I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, I see no end to the confusion arising from the following any other line.

His Lordship therefore declared the legacy to be adeemed.¹

¹ See *Barker v. Rayner*, 5 Mad. 208; s. c. 2 Russ. 122 (1828); *Wyckoff v. Perrine*, 87 N. J. Eq. 118 (1883).

FRYER v. MORRIS.

CHANCERY. 1804.

[Reported 9 Ves. 360.]

ELEANOR IVANSON, by her will, dated the 21st of February, 1800, made among others the following bequest:—

“ I give and bequeath unto Charles Phillott all such sum and sums of money as my executors may after my death receive on the interest note of £400 given to me by Messrs. Cross & Co., bankrupts, Bath, either as a dividend under their commission in part thereof, or which they my executors may receive from the representatives of the late James Cross, deceased, or otherwise, in respect of such note, in trust for all and every the children of the said Elizabeth Fryer that shall live to attain the age of 21 years, equally to be divided between them.”

The testatrix died on the 26th of May, 1800. On the 28th of April preceding the sum of £385 18s., remaining due on the note, was paid to her; and was paid by her into the hands of Messrs. Clement and Tugwell, bankers in Bath; in whose hands she had no other money; but on the 12th of May, she drew the sum of £10 18s.; leaving in their hands at her death the sum of £375.

The bill was filed by the infant children of Elizabeth Fryer against the executors, to have the money received on the note secured for their benefit; and the question was, whether under the circumstances the legacy was adeemed?

The bill charged, that the payment was made without any demand by the testatrix; that she did not blend the money so received with her general estate, or with any other money; but kept it, except the sum of £10 18s., separate and apart from all the money she had; and that she had no expectation, that the money would have been paid in her life.

The answer stated, that some considerable time before the testatrix's death she did take legal steps to recover her debt; and also proved her debt before the Master in a cause, instituted by some of the creditors of the bankrupts. They admitted, there was no other property of the testatrix at the time of the payment, or at her death, in the hands of Clement and Tugwell.

Mr. Richards and *Mr. Roupell*, for the plaintiffs.

Mr. Romilly, for the defendant the executor.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] It does not appear, whether these persons were her own ordinary bankers. This is not, as it is put in Swinburne, laying it up, and safely keeping it for the legatory; but merely paying it to these persons. It is impossible to support this as a subsisting bequest. The principle of ademption by receiving the thing given is certainly, that the thing given no longer exists; for, if after the receipt of it, it could be demanded, that would be converting it into a pecuniary, instead of a specific, legacy. It is said,

this is pecuniary, as it is a bequest of the money to be received. But that is the case of every bequest of a debt. If anything could be made of the circumstance of placing the money with these bankers, it is counterbalanced by the other circumstance, that she drew out a part of that money. That is treating it as her own. If she meant to appropriate it, and consider it as a legacy still standing, and binding upon her estate, she ought not to have touched it. This is not so much to be considered a partial ademption, as evidence of her having deposited it there, to be at her own command.

The bill was dismissed.

PATTISON v. PATTISON.

CHANCERY. 1832.

[Reported 1 *Myl. & K.* 12.]

JAMES PATTISON, by his will, dated in April, 1829, gave to Margaret Forbes, among other bequests, the sum of £50 long annuities, which he described as purchased with £1,000, left him by the will of James Tillard, Esq.

The testator subsequently intermarried with Margaret Forbes; and by a codicil to his will, he confirmed to her, in addition to what she was entitled to under the settlement made upon her marriage. all and every sum and sums of money, property, estate, and effects given and bequeathed to her, under the name of Margaret Forbes, by his will.

At the time of making his will, the testator had, besides the £50 long annuities specifically bequeathed, other annuities of the same description; and he afterwards exchanged all his long annuities for new annuities; by which exchange he made a profit by way of *bonus*, amounting to £100. The term for which the new annuities were granted, was shorter than the term of the long annuities by a quarter of a year.

Subsequently to this transaction, the testator made another codicil, by which he confirmed his will and former codicil. The question in the cause was, whether the widow was entitled to the £50 new annuities purchased with the produce of the £50 long annuities given to her by the will.

Mr. Bickersteth and *Mr. Lloyd*, for the widow.

Mr. Pemberton and *Mr. Wigram*, contra.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] The law is settled that a legacy is adeemed if the specific thing do not exist at the testator's death. The testator truly described the specific gift when he made his will, and there can be no relief upon the ground of mistaken description.

IN RE BRIDLE.

COMMON PLEAS DIVISION. 1879.

[Reported 4 C. P. D. 336.]

APPEAL from the County Court of Dorsetshire. Petition by Louisa Bridle, asking for the payment out of court to her of £200.¹

John Bridle died in 1877. By his will, made in 1872, he bequeathed to the petitioner the mortgage of £200 which he had secured to him on a mortgage of premises in Melcombe Regis. The petitioner, against the objection of the executors of John Bridle's will and of the residuary legatees thereunder, introduced evidence that in 1873, the mortgage above mentioned was paid off; that John Bridle paid the mortgage money into the bank of Williams & Company; that he had a regular account at that bank; that he did not pay this money into his general account, but had it entered in his name to a separate account, which he opened with the bank for that purpose; that he received a separate pass-book; that he handed this pass-book into the custody of the petitioner, stating to her, when he did so, that it was the money he had received from the mortgage, and that she was to keep the book, as he had willed the money to her, for her to receive it after his death, and stating that it would show that the money was for her, and would do away with the necessity of altering his will in consequence of the mortgage being paid off; and that the £200 remained intact in the bank down to the death of John Bridle, he only drawing the interest from time to time, and the petitioner retaining possession of the pass-book. This evidence was uncontradicted. Williams & Company paid the money into a post-office savings bank in the name of the registrar of the County Court to await the decision of the court.

The judge ordered the costs of all parties to be paid out of the £2,000, and the balance to be paid to the petitioner. The executors and residuary legatees appealed.

Bethell, for the appellant.

John Cutler, contra.

DENMAN, J. The testator by his will bequeathed to the petitioner "the mortgage debt of £200 which he had secured to him on a mortgage of premises in King Street, Melcombe Regis, belonging to William Hardy." It is impossible to read those words without seeing that the obvious intention of the testator was to give her the mortgage itself. Has there, then, been an ademption? That depends upon the rule stated by Lord Hardwicke, C., in *Humphreys v. Humphreys*, 2 Cox, C. C. 184, where he said that "the only rule to be adhered to was, to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death, for, if it did not, then there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion." In all the cases relied on by Mr.

Cutler, the language of the will was general, and no one of them conflicts with the rule there laid down, that, in the case of a specific bequest of a thing which has ceased to exist during the lifetime of the testator, the legacy is adeemed.

LINDLEY, J. I am of the same opinion. The first question here is what was bequeathed to Louisa Bridle. It is a bequest of a mortgage, — a specific legacy. The only other question is, where is it? It is not to be found; and there is an end of it. In all the cases relied on by Mr. Cutler, there was a bequest of something which at the death of the testator could be found. This doctrine is as old as the case of *Ashburner v. Macguire*, 2 Bro. C. C. 108, where Lord Thurlow, C., says: "As to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognized by Lord Talbot and Lord Hardwicke. It is that, where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed; but, if paid in without suit or demand, there is no intention to adeem: and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in *Attorney-General v. Parkin*, Amb. 566. expressly exploded this distinction: so did Lord Macclesfield. I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinburne, § 20, p. 7, 6th ed., p. 548. But I doubt if the authors cited by him support him. Godolphin, Orphan's Leg., 4th ed., p. 434, referring to the same books, states the rule differently; and so have other writers. By the civil law it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare by his conduct that such a change was an ademption. The case put is of a gold chain which the testator, after having bequeathed it by his will, converts into a cup: the legacy is not adeemed, because the cup might be restored to its former shape. This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man by his conduct may revive it. It is contrary to common sense; as appears by the instance put. The gold chain may have been given as a legacy because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased." And see the judgment of Lord Thurlow in *Stanley v. Potter*, 2 Cox, C. C. 180, where it was held that a bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. For these reasons, I am of opinion that the petitioner is not entitled to the £200, and the judgment of the County Court judge must be reversed, with costs.

*Judgment reversed.*¹

¹ See *Blackstone v. Blackstone*, 3 Watts, 335 (Pa. 1834).

IN RE TILLINGHAST.

SUPREME COURT OF RHODE ISLAND. 1901.

[Reported 23 R. I. 121.]

PETITION for construction of a will. The facts are fully stated in the opinion.

BLODGETT, J. Upon the agreed statement of facts three questions arise under the fifth clause of the will of Ellen M. Perry, late of Bristol, deceased, concerning the disposition of the sum of \$8,259.07, the cash balance now in the hands of the executor. The clause in question is as follows:

"Fifth. Whereas I am or may be entitled to a certain interest in the estate of my mother, Ellen M. Dabney, deceased, which is now in the hands of the Fidelity Insurance, Trust, and Safe Deposit Company, Now I give, devise, and bequeath the same to the Fidelity Insurance, Trust, and Safe Deposit Company, in trust, to keep the same invested, and to pay the net income thereof to my husband, Raymond H. Perry, for the term of his natural life, and upon his death then to pay the income thereof to his daughter, Frances Raymond Perry, for the term of her natural life, and upon her death then to hold the said estate in trust upon the same terms of trust as are above provided for in the fourth item hereof for the estate over which I have a power of appointment under the will of my said father, Charles H. Dabney."

These questions are:—

1. Does the language of said fifth clause constitute a specific legacy?

2. If so, has such legacy been in whole or in part adeemed?

3. Does the share of Mrs. Perry in the estate of her sister, Frances E. Rhett, come within the provisions of said fifth clause of the will of Ellen M. Dabney?

1. We are of the opinion that the bequest under consideration is a specific bequest. The language used is substantially similar to the language used by the court in *Dean v. Rounds*, 18 R. I. 437, as constituting a specific bequest. It absolutely appropriates a fund clearly defined, and for a long time invested in certain securities easily capable of identification, but whose exact cash value was not known, to one definite object. It was, therefore, an appropriation of the fund itself, rather than an attempt to measure the gift by the amount of an uncertain sum. *Towle v. Swusey*, 106 Mass. p. 106; *Bethune v. Kennedy*, 1 Myl. & Cr. 114; *Stephenson v. Dowson*, 3 Beav. p. 349; *Shuttleworth v. Greaves*, 4 Myl. & Cr. 37.

2. The will of Ellen M. Perry was executed on July 28, 1898, and she died on May 28, 1899. On May 11, 1899, she executed the following receipt to the trustee under Mrs. Dabney's will, as follows;

"Received of the Fidelity Insurance, Trust, and Safe Deposit Company, trustee, the sum of eleven thousand five hundred and fifty-eight

and $\frac{92}{100}$ dollars in kind as set forth in the schedule hereunto annexed, the same being in full of principal and income awarded to me as per the adjudication filed in the Orphans' Court, December 30th, 1898, upon the account of the said The Fidelity Insurance and Safe Deposit Company, trustee, as aforesaid.

“(Signed) ELLEN M. PERRY.

“Witnesses at signing,

“NELLIE D'WOLF ARCHER,

“ABRAM O. POWELL.”

It is agreed that all the securities therein referred to were then delivered to Mrs. Perry, except the two mortgages on property in Philadelphia, which were duly assigned to her by the trust company, but which she directed the trust company to retain in its possession and to proceed to collect for her account. It is conceded, too, that with the exception of these mortgages all the securities enumerated in this schedule were converted by Mrs. Perry to her own uses in her lifetime. We are consequently of the opinion that the legacy was thereby *pro tanto* adeemed, since the specific items of the bequest no longer exist.

In *Kenaday v. Sinnott*, 179 U. S. 606, decided in 1900, Chief Justice Fuller says (p. 617): “The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts, but the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed and the intention that the legacy should fail is presumed.”

In *Tomlinson v. Bury*, 145 Mass. p. 347, decided in 1887, the court say:

“A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator.”

This doctrine has long been well settled. Indeed, the rule as to ademption was laid down very clearly by Lord Chancellor Thurlow in *Humphreys v. Humphreys*, 2 Cox, 185, decided in 1789, as follows:

“That the only rule to be adhered to was to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death, for if it did not, then there must be an end of the bequest, and that the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion.” And see *Stanley v. Potter*, 2 Cox, 180.

As to the two mortgages aforesaid, we are of the opinion that the mere act of transferring them to her own name was not an ademption of them; for it is conceded that they were *in specie* at the time of her death, and the exact amount of their proceeds is clearly known and is held by the executor as a distinct fund. *Lee v. Lee*, 27 L. J. Ch. 824; *Moore v. Moore*, 29 Beav. 496.

Dingwell v. Askew, 1 Cox, 427; *Clough v. Clough*, 3 Myl. & K. 296; *Ashburner v. MacGuire*, 2 Bro. C. C. 108; *Barker v. Rayner*, 5 Madd. p. 217, affirmed in 2 Russ. 122.

Basan v. Brandon, 8 Sim. 171. It is true that these securities are described as being in the hands of the trust company; but in *Prendergast v. Walsh*, 58 N. J. Eq. 149, decided in 1899, which was also a case of ademption, the vice-chancellor held that "the place of deposit was merely used as descriptive of the thing bequeathed. It was used to identify the particular money given, and it is entirely settled that where the place is merely descriptive the removal of the thing to another place is immaterial."

And, finally, we are of the opinion that the terms of the fifth clause, creating this specific legacy, should be strictly limited to the interest which Mrs. Perry had in the estate of her mother, Mrs. Dabney, without including the interest which came to Mrs. Perry as the heir of her sister, Mrs. Rhett.

A decree may be entered in accordance with this opinion.

William R. Tillinghast and Norris & Hoffman, for parties.¹

¹ See *Rogers v. Rogers*, 67 So. Car. 168 (1908).

NOTE.—On the ademption of the legacy of a lease by its renewal, see *Abney v. Miller*, 2 Atk. 593 (1743); *Carte v. Carte*, Ambl. 28 (1744).

A specific legacy is not adeemed by a change of investment ordered but not effected at the time of the testator's death. *Basan v. Brandon*, 8 Sim. 171 (1836).

A testator and chattels which he had specifically bequeathed perished together at sea. *Held*, that the legatee was not entitled to the insurance money. *Durrant v. Friend*, 5 De G. & Sm. 343 (1852).

If a testator, after making his will containing a specific legacy, becomes lunatic, the legacy is adeemed, if the subject-matter is disposed of by order of court, *Jones v. Green*, L. R. 5 Eq. 555 (1868); *In re Freer*, 22 Ch. D. (1882); or, being a debt, is paid to his committee, *Hoke v. Herman*, 21 Pa. 301 (1853). But if the property bequeathed has been disposed of without authority, the legacy is not adeemed, if the property exists *in specie*, *Taylor v. Taylor*, 10 Hare, 475 (1853); or if its proceeds can be traced, *Jenkins v. Jones*, L. R. 2 Eq. 323 (1866).

On the ademption of an appointment under a power, see *In re Johnstone's Settlement*, 14 Ch. D. 162 (1880).

A testator bequeathed all notes of hand which were payable to him at the date of a codicil, January 5, 1849. The testator then held four notes, payable to himself, and signed by Samuel S. Hill and his brother. On February 24, 1849, these notes were taken up, Hill's brother was released at his own request, and four notes payable to the testator, signed by Hill and secured by mortgages, were given to the testator. The notes taken up and the notes given were for one and the same debt. *Held*, that the legacy was not adeemed. *Ford v. Ford*, 23 N. H. 212 (1851).

C. *Ademption of Portions.*

IZARD v. HURST.

CHANCERY. 1697.

[*Reported Freem. C. C. 224.*]

THE defendant's testator by his will gave his four daughters £600 apiece, and afterwards married his-eldest daughter to the plaintiff, and gave her £700 portion; after that he makes a codicil and gives £100 apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of £600 given to his wife by the said will; and the only question was, whether the portion given by the testator in his lifetime, should be intended in satisfaction of the legacy? And held [by SIR JOHN TREVOR, M. R.] that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage or otherwise¹ had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said the words of ratifying and confirming do not alter the case, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter.²

¹ Cf. *Leighton v. Leighton*, L. R. 18 Eq. 453 (1874).

² "The ademption of a legacy of personal estate is not usually called revocation. When the term just mentioned is not used, the act is called satisfaction, payment, performance or execution. But when these terms are thus used, it is not quite in their ordinary sense; for their primary relation is to some debt, duty or obligation resting absolutely upon a party, whereas a will, having no effect in the testator's lifetime, does not bind him to anything. The word ademption is the most significant, because, being a term of art, and never used for any other purpose, it does not suggest any idea foreign to that intended to be conveyed. It is used to describe the act by which the testator pays to his legatee, in his lifetime, a general legacy which by his will he had proposed to give him at his death. (1 Roper, 365, ch. 6.) It is also used to denote the act by which a specific legacy has become inoperative on account of the testator having parted with the subject. But that is immaterial here. Aside from the Statute, an advancement of a like sum, with intent to pay the legacy in question, would, in the understanding of every lawyer, be an ademption. Now, the Statute does not say anything, in terms, respecting ademptions, nor does it allude to do it sooner than in any way, unless it does so in using the term revocation. To revoke is to recall what one has done or promised. A testator who concludes to anticipate a proposed testamentary gift cannot be said, by any just use of language, to revoke or recall it, when, so far from wishing to undo what he has done, he has concluded to do it sooner than he before intended. By a very loose and indeterminate use of language, anything which renders a bequest inoperative at the testator's death may possibly be called a revocation, and we are shown in the opinion referred to that there are instances where it has been so used. Lord Macclesfield is reported to have said, in a case of double portions, that by the laws of all other nations, as well as of Great Britain, the last was

POWEL v. CLEAVER.

CHANCERY. 1789.

[Reported 2 Bro. C. C. 499.]

LORD CHANCELLOR [THURLOW].¹ My opinion will require only a few words.

Mr. Powel, by his will in 1775, gave to Harriot Charlotte Stables a legacy of £6,000, this legacy was not mentioned as being a portion. Afterwards on her marriage £5,000 in the funds, stated in the settlement to be her portion, were advanced. It is in evidence that it was advanced by Powel. It is stated in the settlement to be her portion. He also conveyed an annuity to her use: there are entries in the books of Powel, by which it appears that he had made a calculation of the sums advanced as a portion. In 1783, he made a codicil to his will, by

a 'revocation of the portion given by the will.' The reference to foreign laws shows that the word was used in a very general, and not in a strict or technical sense. It was not said that the will or any part of it was revoked, but that it was a revocation of the portion. It was in a very short opinion taken down by the reporter. (1 P. Wms. 681.) But Lord Eldon, in a more elaborate opinion, in a case of alleged double portions, used the same terms for the like purpose. After qualifying the gift *inter vivos* as an ademption half a dozen times, and as satisfaction still oftener, and alluding to an objection made at the bar, that if the testator had not intended that the legacy should be paid he would have altered his will, he adds: 'The answer [to that objection] is, that the subsequent advance operates as a revocation, and therefore actual revocation is unnecessary.' The meaning is not that the subsequent advance was in a proper sense revocation, but that it operated in that instance in the same way; as if he had said there was no need of his revoking it, as the ademption or satisfaction just as effectually extinguished it. (18 Ves. 155.) But there are a few cases in which judges have been called on to discriminate, in precise and accurate language, between ademption and revocation. *Rosewell v. Bennet*, 3 Atk. 77, already referred to, was the case of a legacy for a special purpose, which it was adjudged he had accomplished by an advance of money in the testator's lifetime. The defendant's counsel relied upon the Statute of Frauds and Perjuries. Lord Hardwicke said: 'As this act of the testator after making his will is not a *revocation* of the will, but an *ademption* only of the defendant's legacy, I am of opinion that the plaintiff ought to be let into this evidence,' &c. (3 Atk. 78.) In *Kirk v. Eddowes*, which has been cited, the defence was that the legacy had been adeemed in part. The Vice-Chancellor, Sir James Wigram, said: 'The evidence [to prove his advancement] does not touch the will. It proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. An *ademption* of the legacy and not *revocation* of the will is the consequence for which the defendant contends.' The Vice-Chancellor then referred to the judgment of Lord Hardwicke, above mentioned. (3 Hare, 519.) These two cases are just one hundred years apart, and connected as the last is by a reference to the first, they may be taken to show the sense of the English Chancery, during all that time, upon the distinction in question." — *per* DENIO, C. J., in *Langdon v. Astor*, 16 N. Y. 9, 39-42 (1857).

¹ Only the opinion on the question of ademption is given.

which £5,000 were given to a niece unborn at the time of making the will. The question is, whether the advancement of £5,000 on the marriage of the defendant is an ademption *in toto* or *in part* of the legacy. A legacy *prima facie* is presumed to be a bounty to the legatee, and must stand as such *donec probetur in contrarium*. The word portion, although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends; it has been determined not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: but it is obvious the intent of the testator is as often disappointed as served by it. Those cases stand on their own ground; this case is an attempt to make a friend's legacy satisfied by a subsequent advancement. There are cases where a man may describe himself so, that the gift by the will, and that in his lifetime, may be intended for the same purpose, but it must appear that he meant to put himself *in loco parentis*; for there are no cases where it has been so held, if the second gift appeared to be *diverso intuitu*. I have gone through all the cases, and it appears to be the result of them, that where a stranger gives a legacy by will, and afterwards gives a sum without any evidence that it is intended for the same purpose, it is not taken as a satisfaction: to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy.¹

Mr. Scott, Mr. Hargrave, and Mr. Mitford, for the plaintiffs.

Mr. Solicitor-General (Macdonald) and *Mr. Ambler*, for the defendants.

PYM v. LOCKYER.

CHANCERY. 1841.

[Reported 5 Myl. & Cr. 29.]

THIS was an appeal from so much of a decretal order made by the *Vice-Chancellor* in this cause as declared that the provisions made by the testator in the cause, on the marriages of the defendants, Frederick Pym, Edmund Lockyer Pym, and Eleanor Penrose Drake (formerly Pym), respectively, were not ademptions or satisfactions of the respective legacies of £5,000, £5,000, and £6,000, by the testator's will bequeathed for the respective benefits of them and their children; and against the directions given by His Honor, consequential upon this declaration.

¹ As to when the testator is *in loco parentis*, see *Grave v. Salisbury*, 1 Bro. C. C. 425 (1784); *Monck v. Monck*, 1 Ball & B. 298 (1810); *Ex parte Pye*, 18 Ves. 140 (1811); *Booker v. Allen*, 2 Russ. & M. 270 (1831); *Powys v. Mansfield*, 8 Myl. & Cr. 359 (1837); *In re Ashton*, L. R. [1897] 2 Ch. 574.

The testator was the grandfather of these defendants, and their marriages took place in their father's lifetime.

The provisions made upon the respective marriages were as follows : Upon the marriage of Frederick Pym, to whom a legacy of £5,000 had been given, by the will, for life, with remainder to his children, a sum of £2,000 3 per cent reduced stock was invested in the names of trustees, upon trust for himself and his intended wife, for their successive lives, and afterwards for their children, and, in default of children, for himself absolutely. Upon the marriage of Edmund Lockyer Pym, to whom a legacy of £5,000 had also been given, by the will, for life, with remainder to his children, the testator made a settlement of certain lands upon him and his children, and executed a bond for £3,000, of which trusts were declared similar to those of the lands ; and upon the marriage of Mrs. Drake (Eleanor Penrose Pym), to whom a legacy of £6,000 had been bequeathed by the will for life, with remainder to her children, the testator, by letters, engaged to invest £4,000 in the public funds, upon trust, after his own death, for the intended wife and her husband, successively, with remainder to her children, and also engaged to pay, during his own life, £150 per annum for the first three years, and £100 per annum afterwards.

[LORD CHANCELLOR COTTENHAM *held* that the testator had put himself *in loco parentis*, but suggested a question whether the legacies were adeemed in whole or *pro tanto*. The question thus suggested was argued before him at a subsequent day.]

Mr. Bethell, *Mr. Loftus Lowndes*, and *Mr. Chandless*, for Frederick Pym and the children of Edmund Pym.

Mr. Richards, for Mrs. Drake.

Mr. Wigram and *Mr. G. L. Russell*, for the unadvanced grandchildren.

THE LORD CHANCELLOR. When, upon the first argument of this case, I had come to the conclusion that the testator had placed himself *in loco parentis*, and that the effect of the portions upon the provisions by the will was, therefore, to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession, and laid down in all the text-books of authority, and apparently founded upon the highest authority, was to regulate the division of the property ; the rule to which I refer being, that a portion " advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion." I could not but feel that, in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any

one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced.

So far the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement is not permitted to lessen or destroy the provisions made for the others, by giving both provisions to the child advanced; but the supposed rule that the larger legacy is to be adeemed by the smaller provision, appears to me not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent. Can it be assumed, as a proposition so general as to be the foundation of a rule of property, in the absence of any expressed intention, that the marriage of one child and the advancing a portion to such child, furnishes ground for the father's altering the mode of distributing his property amongst his children, by taking from the portion previously destined for that child, and, to the same extent, adding to the provision for the others? Is it not, on the contrary, the usual course and practice that the father, upon a child's marriage, parts with the control over as little as possible, preferring to reserve to himself the power of disposing of the residue of the portion destined for such child, as its future circumstances and situation may require? In doing so, the father is not influenced only by the natural preference of bounty to obligation, but adopts a course which he may well be supposed to think most beneficial for his children. Where, then, is the ground of the presumption, that he intended, by advancing part of what he had destined as the portion of that child, to deprive that child of the remainder?

The argument in favor of the proposition appears to me to be founded upon technical reasoning as to the term "portion," without due consideration of the sense in which that term is used. The giving a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and although the parent has, by his will, adjudged the amount of that moral debt to be a certain sum, he is supposed, by the settlement, to have departed from that judgment, and to have substituted the amount settled; and this only because the one provision and the other are considered as a portion. This, however, assumes the portion settled to be intended as a substitution of the portion given by the will; and such intention, if proved, would remove all doubt; but the question is, whether such intention is to be presumed, in the absence of all proof. Is it not more reasonable to suppose that the intention as to the amount of the portion remains the same, and that the sum settled is only an advance of part of what the will declares to have been the intended amount of the whole? There is no reason for supposing the sum advanced to be the whole

portion intended for the child; and if so, there can be no reason for assuming it to be substituted for the whole. The effect of a portion advanced by a parent upon a legacy before given is called an *ademption*; but if the principle of *ademption* be applied to this case, the consequence now under consideration will not follow. The gift or alienation of part of what constitutes a specific legacy will not destroy the legacy as to what remains. So, the admitted exceptions to this general rule do not seem very consistent with the existence of that part of it now under consideration. The rule is said not to apply, when the testamentary portion and the subsequent advancement are not *ejusdem generis*. This may be very reasonable, as indicative of intention, but it is not easy to discover why, if one thousand pounds advanced is to be an *ademption* of a ten thousand pounds legacy, a gift of stock in trade of the value of £1,500 is not to be an *ademption* of a legacy of £500, which, in *Holmes v. Holmes*, 1 Bro. C. C. 555, it was held not to be. So, a testamentary gift of a residue, or part of a residue, is said not to be *adeemed* by a subsequent advancement, because the amount is uncertain; but, in that case, the child, if sole residuary legatee, takes, as advancement, part of what it would, if no such advancement had been made, have taken as residue. The gift under the will operates, though diminished by the amount of the advancement. The Statute of Distributions, the customs of London and York, and the whole doctrine of *hotchpot*, proceed upon the principle that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality, and not, according to the rule contended for, inequality, between the children.

It appears to me, therefore, that all reasoning and all analogy are against the supposed rule. It remains to be examined, whether the authorities are such as to make it my duty to act upon it; and I cannot but express the satisfaction I have felt at having had the cases so thoroughly examined. I think the profession and the public are much indebted to those whose industry and ability have brought the real state of this question so satisfactorily before me.

Hoskins v. Hoskins, Pr. Ch. 263, decided in the year 1706, is a case in which a smaller sum advanced was held to be an *ademption*, *pro tanto*, of a larger legacy; but it does not appear whether the decision proceeded upon the evidence of intention.

Hartop v. Whitmore, Pr. Ch. 541, and 1 P. W. 681, determined in 1720, is a very important case, being one generally referred to in support of the supposed rule, which, if the report in Peere Williams had been correct, it never could have been. As there reported, it is a case of a legacy of £500, *adeemed* by an advancement of £300; but, it appears from Mr. Cox's note to Peere Williams, the report in *Precedents in Chancery*, and the Registrar's Book, that the whole statement of the facts in Peere Williams is erroneous. There was a legacy of £300 in one event, and of £200 in another, and an advancement of £200; and it was

held that the £300 never became payable, in the events which happened, and that the £200 was adeemed or satisfied by the £200 advanced.

Norton v. Norton, in a note to *Pusey v. Desbouvrie*, 3 P. W. 316, was cited; but that case appears to refer to advancements under the custom of London.

The case of *Clerk v. Lucy*, 8 Vin. Ab. 154, in the year 1716, only proves that this supposed rule was never supposed to apply to devises of real estate; but the case is principally valuable as showing, though only from the argument of counsel, that the supposed rule does not appear to have been heard of in 1716. The counsel are reported to have said: "Suppose a father by his will gives his daughter £10,000, and afterwards marries her, and gives her £5,000 for her portion, and then dies, without revoking his will, this is clearly not a revocation of the whole devise of £10,000, but only a revocation or satisfaction *pro tanto*, viz. £5,000, and she shall take the other £5,000 by the will. This is a plain case, and the same in reason as the present."

In *Farnham v. Phillips*, 2 Atk. 215, 24th of October, 1741, the decision turned upon the legacy being a residue; but Lord Hardwicke is reported to have thus expressed himself: "Where a father, after making his will, advances his child with a portion *as great or greater* than the legacy given by the will, such provision has always been held an ademption."

Dicta of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may safely be relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind, because another *dictum* of that very eminent judge, in *Shudal v. Jekyll*, 2 Atk. 516 (see page 518), 25th of February, 1742, is relied upon in support of the supposed rule. The case itself has no application to the point now under consideration, the decision having turned upon this, that the testator did not stand *in loco parentis*; but Lord Hardwicke is reported to have said: "This court, to be sure, leans strongly against double portions, or double provisions; and whether the portion given in the lifetime is less, or not, is no ways material." Lord Hardwicke may have meant that, so far as the portions are double, i. e., the one a repetition of the other, one only shall prevail; and that it is not material whether such repetition be as to part or as to the whole of the legacy, which would make this *dictum* consistent with the former; but, assuming that the obvious meaning of the words is to recognize the supposed rule, the effect will be removed by the fact of the erroneous report of *Hartop v. Whitmore* having been cited; and, the point not being the subject of argument or decision, Lord Hardwicke may, naturally, at the moment, have assumed that report to be a correct exposition of the law. A *dictum* under such circumstances could have no weight against a contrary opinion expressed only a few months before.

The case of *Rosewell v. Bennet*, 3 Atk. 77, in the year 1744, is a decision only as to the admissibility of evidence; and Lord Hardwicke's observations show that he considered the £300 legacy and the £200 advanced as intended for the same purpose; which places this case in that class which have decided that, even when the testator is a stranger, the advance of money to effect the purpose for which the legacy was given operates as an ademption; and in Mr. Roper's book on Legacies (Vol. I., page 329), the case of *Rosewell v. Bennet* is cited in support of that proposition. It is also to be observed that if the £200 advanced had, *per se*, raised the presumption of an intention to revoke the £300 legacy, the evidence tendered would have been useless to fortify the presumption, as there does not appear to have been any evidence offered to repel it.

Clarke v. Burgoine, 1 Dick. 353, anno 1767, is another case generally cited in support of the supposed rule, and, as reported in Dickens, it would be a strong authority for that purpose; for it is there represented that Lord Camden decided that a settlement of £6,000 was an ademption of two legacies of £3,500 each; but, upon reference to the Registrar's Book, it appears that, instead of there having been two legacies of £3,500 each, there were three legacies, one of £2,000, one of £500, and one of £1,000, making together only £3,500; so that this case does not bear upon the question.

It thus appears that the only two cases in which it appeared that a smaller advancement had been held to be an ademption of a larger legacy, that is, *Hartop v. Whitmore* and *Clarke v. Burgoine*, are inaccurately reported, and that in neither of them did the facts exist to raise any such question.

In *Grave v. Lord Salisbury*, 1 Bro. C. C. 425, in 1784, the point decided was different; but the Attorney-General, in arguing for the ademption, only contended that, in provisions by a father for a child, the general principle was, that every sum of money advanced was a satisfaction for so much of the legacy.

The case of *Powel v. Cleaver*, 2 Bro. C. C. 499, in the year 1789, was not decided upon any point applicable to the present case; but the doctrine now in question was much discussed, and Lord Thurlow, in one part of his observations, supposes a possible case of a legacy of £6,000 being adeemed by an advancement of £5,000, but upon the untenable ground that £5,000 *in præsenti* was equal to £6,000 under the will of a living man, assuming, therefore, that the advancement must be of equal value with the legacy; but this the supposed rule, if it existed, would repudiate, as it is not conceived to regard the relative values of the legacy and the advancement, provided both be in the nature of portions.

In *Robinson v. Whitley*, 9 Ves. 577, in 1804, the legacy was £1,000, and the sum advanced £500. Sir William Grant thought the presumption was altogether rebutted by the evidence; but the counsel, who argued in support of the ademption, only contended "that an

advancement by a father to a child was considered, *prima facie*, as an advancement, *pro tanto*, of what was given by the will."

In *Monck v. Monck*, 1 Ball & B. 298 (see page 304), in 1810, the legacy was £5,000, and the sum advanced upon the marriage of the legatee was £4,000, and Lord Manners says the £4,000 is certainly a satisfaction *pro tanto* of the £5,000; but he dismissed the bill, because it was proved that another sum of £1,000 had been previously paid by the testator to the legatee, in part of the £5,000.

There appear to be two cases in which this question came under the consideration of Lord Eldon, *Trimmer v. Bayne*, 7 Ves. 508, in 1802, and *Ex parte Pye*, 18 Ves. 140, in 1811; but in neither was there any decision upon it. In the former, the legacy and the provision were equal: in the latter, the legacy was £4,000 and the advancement £3,000. All that was contended for was, that the £3,000 was to be considered as an advancement, and in *part* satisfaction of the legacy of £4,000. Lord Eldon decided that the advancement was not a satisfaction of the legacy, but upon grounds which have no application to the present question. The case, therefore, is important only from the observations which fell from Lord Eldon, and it is not easy to determine on which side they preponderate. He says that, from his recollection of the case of *Grave v. Lord Salisbury*, Lord Thurlow stated that if a portion be given to a child by a will, and, afterwards, an advancement is made on marriage, that is, *prima facie*, an ademption of the whole, or *pro tanto*; and he afterwards says that it is the unquestionable doctrine of the court, that where a parent gives a legacy to a child, and afterwards advances a portion on marriage of that child, though of less amount, it is a satisfaction of the whole, or in part: the meaning of which, as I understand it, is, that if the advancement be equal to the legacy, it is a total ademption, and if less, *pro tanto* only; and he immediately proceeds to state that some cases have gone the length of holding that a portion, though much less than the legacy, has been held a satisfaction of the whole. As the only cases in which this appears to have been decided are *Hartop v. Whitmore* and *Clarke v. Burgoine*, Lord Eldon must be assumed to have referred to them, or to be speaking from general recollection of what appears to have been decided by them, and if so, the expressions used are accounted for; but all the importance which would otherwise belong to anything falling from Lord Eldon, is removed, by its being ascertained that both those cases are erroneously reported, and that neither of them has any reference to the doctrine they have long been supposed to establish.

The result of a careful examination of the authorities is, that there is not sufficient authority to support the supposed rule, but that, on the contrary, the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is, in its operation, generally destructive of the interests which parents have intended for their children, I think it my duty, notwithstanding the manner in which it has been received in the profession, to decline adopting or following it, and,

therefore, to declare that the advancements, upon the respective marriages in this case, are to be taken as adoptions, *pro tanto* only, of the legacies before given.

WESTON v. JOHNSON.

SUPREME COURT OF JUDICATURE OF INDIANA. 1874.

[Reported 48 Ind. 1.]

FROM the Porter Circuit Court.

S. J. Anthony, F. Church, S. E. Perkins, and S. E. Perkins, Jr.,
for appellant.

T. J. Merrifield, for appellees.

WORDEN, J. This was an action by the appellees against the appellant, to recover the following land, situate in Porter county, Indiana, viz.: The southeast quarter of section twenty-two, in township thirty-seven, north of range five west.

Issue, trial by the court, finding, and judgment for the plaintiffs, a motion for a new trial on behalf of the defendant having been overruled; exception.

The court made what purports to be a special finding of the facts, and the conclusions of law thereon; but as this does not appear to have been done at the request of either of the parties, the finding can only be regarded as a general one. *The Board of Comm'rs of Tippecanoe County v. Reynolds*, 44 Ind. 509, and cases there cited.

The defendant assigned as a reason for a new trial, "that the decision was not sustained by sufficient evidence."

Other reasons were assigned, which need not be noticed.

It is objected that this reason for a new trial is insufficient, because the word "decision" is used, instead of the word "finding." We think the word was used as synonymous with "finding," inasmuch as the insufficiency of the evidence to sustain it was pointed out. It could not have had reference to the conclusions of law from the facts found, because the sufficiency or insufficiency of the evidence has nothing to do with the conclusions of law. The plain import of the reason assigned is, that the finding of facts by the court was not sustained by the evidence. It would, in our opinion, subvert rather than promote the ends of justice to hold the reason insufficient.

The evidence is in the record, which we now proceed to consider, together with the questions arising upon it.

The plaintiffs are the heirs at law of Carey Johnson, deceased. On April 14th, 1852, Carey Johnson, who then resided in Hamilton county, Ohio, owned the land now in dispute, as well as the southwest quarter of section twenty-three, in the same township and range. These two quarter sections, it will be seen, adjoin each other, the quarter in section twenty-three lying immediately east of that in section twenty-two, the

quarter in controversy in this suit. On the day last named, Carey Johnson made his last will and testament, by which he devised to the defendant, Francis Weston, the land in controversy herein, viz. the quarter lying in section twenty-two; he also devised to Carey J. Munger the quarter lying in section twenty-three. Francis Weston and Carey J. Munger were the grandchildren of the testator.

It is said, in the brief for the appellees, that at the time of the execution of the will the father and mother of Francis Weston were dead, and that he was living with his grandfather as one of his children. This, however, we do not find sustained by the evidence. It does not appear from the evidence, unless we have inadvertently overlooked it, whether his father was dead or living at that time.

On August 1st, 1853, Carey Johnson, then living, and his wife, executed a warranty deed, for the specified consideration of one hundred dollars, to the appellant, Francis Weston, for the quarter section of land lying in section twenty-three, the piece which, by the will, had been devised to Carey J. Munger. It appears that, at the time this deed was executed, the appellant was living at his grandfather's and had been a member of his family about a year. The appellant paid no money or other valuable consideration for the conveyance to him. There is no evidence in the case showing, or tending to show, that the testator intended that the land thus conveyed by him to the appellant should be received in lieu of that devised to him. It is not shown that the testator, at the time of the execution of the deed or at any other time, said anything on the subject; nor is there any evidence showing his intent in this respect. The appellant, however, was asked the following question, and gave the appended answer, viz.:—

“Was not the land deeded to you as an advancement of that which you were to take by the will, and did you not so understand it at the time?

“Ans. I did so understand it at the time.”

Carey Johnson having died, the appellant took possession of the land in controversy, in the year 1870, claiming it under the will. The appellees, the plaintiffs below, claim it as the heirs at law of the deceased.

The will of the deceased gives the land to the appellant in terms; and there is no objection made to the will by the appellees, either in respect to its terms, mode of execution, or the probate thereof. But the appellees claim that the conveyance, by the testator in his lifetime, of the piece of land in section twenty-three, to the appellant, operated as an ademption or satisfaction of the devise to him of that in controversy, and, hence, that the latter parcel descended to the heirs at law.

The principle on which the appellees base their claim is thus stated by Mr. Justice Story: “The second class may be illustrated by reference to the case, where a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterward in his lifetime, gives a portion, or makes a provision for the same child or grand

child, without expressing it to be in lieu of the legacy. In such a case, if the portion so received, or the provision so made, on marriage or otherwise, be equal to, or exceed, the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*; then it will be deemed a satisfaction of the legacy, or, as it is more properly expressed, it will be an ademption of the legacy. If the portion or provision be less than the amount of the legacy, it will at all events be deemed a satisfaction *pro tanto*; and, if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption. But if the difference be large and important, there, the presumption of an intention of substituting the portion for the legacy will not be allowed to prevail." Story Eq. § 1111.

The ground of the doctrine is stated in the next following section to be, "that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether called so or not; and that, afterward, if he advances the same sum upon the child's marriage, or on any other occasion, he does it to accomplish his original object, as a portion; and that, under such circumstances, it ought to be deemed an intended satisfaction or ademption of the legacy, rather than an intended double portion."

The same author, in section 1113, thus speaks of the doctrine: "It may be added, that courts of equity make out this sort of doctrine, not upon any clear intention of the testator anywhere expressed by him, but they first create the intention, and then make the parent suggest all the morals and equities of the case, upon their own artificial modes of reasoning, of which it is not too much to say, that scarcely any testator could ever have dreamed."

But whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence. The cases based upon it are numerous in both countries, but no collection of them will be attempted in this opinion.

We proceed to consider whether the case in judgment falls within the doctrine stated. We may observe that the evidence tends to show that the two pieces of land are of nearly equal value, so that the slight disparity in that respect would not prevent the operation of the principle, if otherwise applicable. Here, we may observe that we attach no importance to the fact that the appellant, when he took the deed, understood that the land conveyed to him was an advancement of what he was to take by the will. His understanding in that respect can in no way affect the question involved. The intention of the testator is the important consideration, and that intention does not appear. Suppose the case were one of a bequest of a sum of money, where the principle would be clearly applicable, and the sum bequeathed had been advanced to the legatee by the testator in his lifetime, and the legatee had understood the advancement to be in addition to what he was to receive by the will, but the testator had understood it differently, the intention of

the testator would clearly control, and not the understanding of the legatee.

The question, therefore, is a question of law arising upon the facts, without any evidence of the real intention of the testator, further than may be gathered from the facts, that by his will he devised to the appellant, his grandson, one piece of land, and afterward conveyed to him another piece, of equal quantity and about equal quality and value.

The rule is only applicable, as we have seen, where a parent, or one standing *in loco parentis*, makes the bequest. Great-uncles, uncles, grandfathers, or grandmothers or putative fathers, are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. Williams Ex'rs, 1204; Roper Leg. 382. "The test," says the author last quoted, same volume, page 385, "in those cases seems to be, whether the circumstances, taken in the aggregate, amount to moral certainty that a testator considered himself in the place of the child's father, and as meaning to discharge that natural obligation which it was the duty of a parent to perform, for that is the principle. The mere circumstance of a provision made by a relation being so usual without any intention to interfere with the relative obligation between parent and child, that no clear inference arises from such a provision that the testator meant to substitute himself *in loco parentis*."

The evidence, as we have seen, does not show that the appellant's father was dead at the time of the execution of the will; but if it did, that circumstance would not of itself be sufficient to show that the testator intended to place himself *in loco parentis*, but it would be a circumstance to be considered. Roper Leg. 386. Nor does the evidence show that at the time of the execution of the will the appellant lived with the testator, or was in any way a member of his family. In short, the evidence does not show that the testator stood *in loco parentis*, and, therefore, does not show that the case comes within the principle relied upon.

We however regard this as a point of minor consequence, as there are other considerations involved, more fundamental in their character, which are decisive against the application of the doctrine sought to be applied to the case.

The devise to the appellant was of certain specific land, and was a specific devise, if, indeed, all devises of real estate are not to be regarded as specific. See Wigram Wills, 2 Am. ed., part 2, 339.

We are not aware that the doctrine of the ademption of legacies by subsequent advancement has ever been applied to specific legacies; and if it is not applicable to specific legacies, it certainly cannot be to specific devises.

We are of opinion, from such examination as we have been able to give the authorities, that the doctrine has no application to specific legacies. The reason of the doctrine as applied to general legacies does not apply to specific legacies.

If a father by his will make a general bequest to his son, for example, of a thousand dollars, or a hundred head of sheep or cattle, no particular sheep or cattle being specified, so that any sheep or cattle would fill the bequest, this may well be deemed as intended for a portion for the son; and if the father in his lifetime give to the son a like sum of money, or the like number of sheep or cattle, it may well be assumed that he does it to accomplish his original object of giving the son a portion; and the courts will hold that the bequest is adeemed; otherwise the son would receive a double portion, when it is assumed that the testator intended that he should have but a single portion. But where a father bequeaths to his son a specific article of personal property, as a particular horse, a particular watch, book, or other article, pointing it out and identifying it, so that the legatee becomes entitled to the particular thing *in specie*, and not merely to any like thing, it cannot be said, nor has it ever been held, so far as we are advised, that the bequest is intended as a portion for the son. There are many motives besides an intent to give a portion, that may induce a father to give his child, by will, specific articles of personal property, or, indeed, specific parcels of real estate.

The doctrine, as applied to general legacies, cannot be practically applied to specific legacies at all, in some respects.

We have seen, that if the provision made subsequent to the will is less than the legacy, it will be a satisfaction *pro tanto*.

Suppose a father bequeath to his son a particular ten-thousand-dollar government bond, so identifying and describing it that the particular bond would pass to the legatee. But the father gives to the son in his lifetime nine thousand dollars in government bonds. Is the legacy in any part adeemed? It is conceived that the son must take the whole bond bequeathed to him, or no part of it. If, however, the testator had bequeathed his son ten thousand dollars in government bonds, but no particular bond or bonds had been specified, the legacy therefore being general and subject to be discharged by any bonds of the description specified, the case would have been governed by the doctrine under consideration.

As before stated, we know of no case in which the doctrine of ademption by advancement has been applied to specific legacies. The elementary writers do not recognize its application to the latter class of legacies. Specific legacies are adeemed by the sale or destruction of the thing bequeathed in the lifetime of the testator. "In regard to the revocation of bequests of personal estate by ademption, the general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the death of the testator, remain *in specie* as described in the will; otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should

change its form so as to alter the specification of it, as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed." 1 Jarman Wills, 4 Am. ed., page 172, note 1.

In Roper Leg. 329, under the sub-title of "the ademption of specific legacies," it is said: "The word 'ademption,' when applied to specific legacies of stock or of money, or securities for money, must be considered as synonymous with the word 'extinction.' For it should be observed, that if stock, securities, or money, so bequeathed, be sold or disposed of, there is a complete extinction of the subjects, and nothing remains to which the words of the will can apply; for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be (as expressed by a learned judge), to convert a specific into a general legacy. But with respect to general legacies not given as portions, the rule respecting ademption depends upon different considerations. The intention of the testator is immaterial in the ademption of specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate; but it is otherwise in regard to general legacies which are payable out of the general personal estate; there the question whether any advancement by the testator in his lifetime to the legatee shall be considered an ademption or in substitution of the bounty given by the will must depend entirely upon the fact, that such was the testator's intention."

This whole paragraph seems totally inconsistent with the idea that a specific legacy can be adeemed by advancement in the lifetime of the testator. The word "ademption," when applied to specific legacies, he regards as synonymous with "extinction." Then the same author, in the same volume, at page 364, under the title "of general legacies, and their ademption," &c., discusses the subject of ademption by subsequent advancement. See, also, Wigram Wills, 360, 361, part 2.

In 2 Redfield Wills, 439, the doctrine of ademption by advancements is stated as applicable to general legacies.

In *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, the doctrine of ademption by advancements was discussed and applied, but the learned judge who delivered the opinion of the court (Denio, C. J.) remarked (page 33): "In what I shall have to say upon this question, I shall assume that the legacy in question is not specific, but pecuniary and general." This remark would have been unnecessary, and, indeed, inappropriate, had it been supposed that both classes of legacies stood upon the same ground in this respect.

If, as before observed, a specific legacy is not adeemed by advancements, it follows, as we think, quite conclusively, that a specific devise of land is not adeemed by advancement. Moreover, we are not advised of any case in which the doctrine of ademption by advancement has been applied to devises of real estate.

In the case of *Davys v. Boucher*, 3 Y. & Col. Ex. 397, decided as late as 1839, it was said by Alderson, B., that as far as his researches

had extended, he did not find any instance of this principle having been extended to devises of real estate.

In *Williams Ex'rs*, 1202, the author says: "It should seem also, that the principle does not extend to devises of real estate," referring to the case in 3 Y. & Col. So, in 2 Red. Wills, 441, it is said, referring to the same case, that "the principle of ademption, by a subsequent portion, has not been applied to devises of real estate."

In the case of *Clark v. Jetton*, 5 Sneed, 229, 236, it is said by the court, that "this doctrine of ademption does not apply to real estate."

These are all the authorities upon the point that have come under our notice. The negative authorities are meagre, and, of themselves, inconclusive. But the absence of affirmative authority for the application of the doctrine to devises of real estate is conclusive that it is not applicable to them.

But the counsel for the appellees, in a well prepared and able brief, has suggested that Baron Alderson in supposing, as he did in the case cited from 3 Y. & Col., *supra*, that there was no case in which the principle had been applied to devises of real estate, was mistaken. Several cases are cited, in which it is claimed that the principle was thus applied. We proceed to examine them.

The first is that of *Williams v. Duke of Bolton*, 1 Dick. 405; 4 Drury & Warren, 225. It appears to have been decided in the case cited, that a gift of a rent-charge might be a satisfaction of a sum in gross charged upon land. This, however, is not in point. A sum of money charged upon land is not the land itself. The money, the subject of the legacy, is personal, and when it is paid the land is freed. The charging of it upon land is only a mode of securing its payment. These observations apply also to the cases of *Hartopp v. Hartopp*, 17 Ves. 185, and *Brudenell v. Boughton*, 2 Atk. 261.

The case of *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211, was this: There was a covenant to settle lands of a certain value, and a subsequent purchase by the covenantor of lands of a smaller value, which were, at the covenantor's death, undisposed of, and which went by descent to the covenantee. It was held, that the land so purchased was a satisfaction *pro tanto*. We do not regard this case as at all in point. A covenant to settle lands is totally dissimilar to a devise of lands; so, also, is the descent of lands to one a different thing from a conveyance of it to him. A similar case was that of *Wilcocks v. Wilcocks*, 2 Vern. part 2, 528.

The cases of *Rosewell v. Bennet*, 3 Atk. 77, and *Kirk v. Eddowes*, 3 Hare, 509, are no further in point than to show that the doctrine of ademption by advancement is not based upon the theory of a revocation of a will.

The case of *Bellasis v. Uthwatt*, 1 Atk. 497, is cited for the following observations of the Lord Chancellor: "In respect to the doctrine of satisfactions for money before due, the thing given in satisfaction

must be of the same nature, and attended with the same certainty as the thing in lieu of which it is given, and land is not to be taken in satisfaction for money, nor money for land. It is true, here they are both of the same nature, both personal estates," &c.

This extract shows that the Chancellor was speaking of a case where a bequest was to be taken in satisfaction of money before due, and not where something advanced was to be taken as an ademption of the bequest. Besides this, both were personal.

The remark put by way of illustration, that "land is not to be taken in satisfaction for money, nor money for land," by no means establishes the proposition, nor do we think it conveys the idea that the doctrine of ademption, as applied to general legacies, applies to devises of land.

We have thus considered the authorities cited to show that the doctrine has been applied to devises of land. In our opinion, they do not show it.

From these considerations, we conclude that the doctrine of the ademption of legacies, by advancement to the legatee by the testator in his lifetime, has no application to specific legacies or devises of real estate.

It follows that the appellant's title to the land in controversy, under the will, is good, and that a new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial.¹

CARMICHAEL v. LATHROP.

SUPREME COURT OF MICHIGAN. 1896.

[Reported 108 Mich. 473.]

APPEAL from Wayne; *Donovan*, J. Submitted January 16, 1896. Decided February 26, 1896.

Bill by Marilla B. Carmichael against Ada M. Lathrop and Emily B. Lloyd to charge the defendants with the value of certain property alleged to have been conveyed to them in partial satisfaction of their legacies under the will of Henry P. Pulling, deceased. From a decree dismissing the bill, complainant appeals. Reversed.

¹ "As far as my researches have extended, I do not find any instance of this principle having been extended to devises of real estate, and I think so to extend it would be to repeal that provision of the Statute of Frauds which applies to the revocation of wills of real estate." — *Per* ALDERSON, B., in *Davys v. Boucher*, 3 Y. & C. Ex. 397, 411 (1839).

See, accord, *Burnham v. Comfort*, 108 N. Y. 535 (1888). But in *Jones v. Mason*, 5 Rand. 577 (Va. 1827), it was held that a legacy of slave A. might be adeemed by a subsequent gift of slave B.; and in *Hansbrough v. Hooe*, 12 Leigh, 316 (Va. 1841), it was held (by two judges against one) that a devise of certain land might be adeemed by a subsequent gift of other land.

Fraser & Gates, for complainant.

C. A. Kent, for defendants.

HOOKEE, J. The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that —

“*Second.* All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. . . .

“*Third.* I hereby authorize and empower my hereinafter named executors to sell and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise investing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first-class, unincumbered real-estate mortgages, or in United States bonds or Michigan State bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will.

“And, lastly, I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother-in-law William P. Bridgman, of Detroit, and my son-in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made.”

Mr. Pulling died in July, 1890, and the will was probated August 19, 1890. Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of \$65,000, that there was due to him upon land contracts \$45,000, that he owned other personal property to the amount of \$30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth \$14,000, and that received by Mrs. Lathrop said to be worth \$10,000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however,

gave to her money from time to time, for her support, which aggregated \$1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as adempments of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed to Mrs. Lloyd and Mrs. Lathrop before the testator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as an ademption or a satisfaction *pro tanto* of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters legatees, although they may have been also devisees as to the real estate, if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator.

If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands

to the legatee *in loco parentis*. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-writers have severely condemned the rule. See 2 Story, Eq. Jur. §§ 1110-1118. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, though it has met with approbation from other high authorities." 2 Williams, Ex'rs (7th Am. Ed.), *1194. Story's condemnation of it is strong, but he adds, "We must be content to declare, '*Ita lex scripta est.*' It is established, although it may not be entirely approved." And Worden, J., in *Weston v. Johnson*, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence." *Shudal v. Jekyll*, 2 Atk. 518; *Ex parte Pye*, 18 Ves. 140, 2 White & T. Lead. Cas. Eq. (4th Ed.) 741; *Van Houten v. Post*, 33 N. J. Eq. 344. With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation (*Ex parte Pye*, 18 Ves. 140); but the rigor of this rule has been relaxed, and cannot now be said to be the law. *Pym v. Lockyer*, 5 Mylne & C. 29, 55; *Montague v. Montague*, 15 Beav. 565; 2 Williams, Ex'rs (7th Am. Ed.), *1195; *Hopwood v. Hopwood*, 7 H. L. Cas. 728; *Wallace v. Du Bois*, 65 Md. 153, 159. And see cases cited in 1 Pom. Eq. Jur. § 555, note 3. There are cogent reasons in support of the rule stated, — *i. e.*, that payment to a son adeems the legacy, — which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. *Suisse v. Lowther*, 2 Hare, 424, 433.

While the authorities are a unit that a legacy by one *in loco parentis* will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. *Freemantle v. Bankes*, 5 Ves. 85; *Clendenen v. Clymer*, 17 Ind. 155; 2 Story, Eq. Jur. § 1115. This exception fell with the discharging of the rule that satisfaction must be in full. *Pym v. Lockyer*, 5 Mylne & C. 29; *Montefiore v. Guedalla*, 1 De Gex, F. & J. 93. Again, it was held that it could not be applied unless the advancement was *ejusdem generis* with the legacy. See 2 Story, Eq. Jur. § 1109.

Counsel for the defendants contends that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, *even though that was the clear intent of the testator*," and he cites several authorities to sustain the proposition. In *Arthur v. Arthur*, 10 Barb. 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation *pro tanto*." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it.

The court of appeals considered the subject in *Burnham v. Comfort*, 108 N. Y. 535 (2 Am. St. Rep. 462). In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express understanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that, to sustain such claim, they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter," of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty." After discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented.

The supreme court of South Carolina, in the case of *Allen v. Allen*, 13 S. C. 512 (86 Am. Rep. 716), had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said:

"It would seem that, upon the same principles, devises of real estate ought likewise to be deemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb that distribution of his property which he thought was proper and just to his de-

scendants. For, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed, by law."

Attention is also called to the case of *Swails v. Swails*, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, viz.: 60 acres to J., the son; and 40 acres to N., a grandson. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the deviser does not stand *in loco parentis*. The case followed *Weston v. Johnson*, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in *Campbell v. Martin*, 87 Ind. 577, it is said, "But we know of no reason whatever for the extension of this doctrine, and making it applicable to devises of real estate."

In *Marshall v. Rench*, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy, — *e. g.*, where the conveyance to the devisee is of the same land, — because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except *Arthur v. Arthur*, hereinbefore discussed.

We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely; except the South Carolina case, and in that case the claim of ademption was sustained as to the legacies.

2 Woerner, Adm'n, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that—

"Specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And, for the same reason, real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See *Hansbrough v. Hooe*, 12 Leigh, 316 (37 Am. Dec. 659).

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to

deprive a devisee of title to land willed to him, but it is claimed that the presumption that a *bequest* to a son is satisfied *pro tanto* by a gift is not to be applied where the gift is of land instead of money, or other personal property *ejusdem generis*.

In *Richards v. Humphreys*, 15 Pick. 140, will be found the following *dictum* of Shaw, C. J.:

"We have seen that ademption depends solely upon the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had the money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. *Had he purchased a house or other property* in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect."

It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction *pro tanto* of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is upon the legatee. *Ford v. Tynte*, 2 Hem. & M. 324. A gift to a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent.

There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, *e. g.*, where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine *ejusdem generis* is its effect upon the presumption. The doctrine that the property conveyed must be *ejusdem generis* appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction *pro tanto*. It has been said in early cases that "when the gift by will and the portion are not *ejusdem generis*, the *presumption will be repelled*. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." *Bellasis v. Uthwatt*, 1 Atk. 428; *Goodfellow v. Burchett*, 2 Vern. 298; *Ray v. Stanhope*, 2 Ch. R. 159; *Saville v. Saville*, 2 Atk. 458; *Grave v. Earl of Salisbury*, 1 Brown, Ch. 425. But see *Bengough v. Walker*, 15 Ves. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see *Pym v. Lockyer*, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In *Jones v. Mason*, 5 Rand. (Va.) 577, the court said, "This whole class of cases depends upon the intention;" citing *Hoskins v. Hoskins*, Prec. Ch. 263, and *Chapman*

v. *Salt*, 2 Vern. 646. Again, it was said: "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention;" citing *Rickman v. Morgan*, 1 Brown, Ch. 63, 2 Brown, Ch. 394. In *Bengough v. Walker*, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of £2,000, when it was so intended. See, also, *Gill's Estate*, Pars. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of *ejusdem generis*. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that conveyance of real estate will not be held a satisfaction of any legacy, in whole or in part, even though the intent of the testator is clear."

We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proven in the manner provided by our statute for the revocation of wills, that is, by the destruction of the will, or the making of a new will." 2 How. Stat. § 5793; *Lansing v. Haynes*, 95 Mich. 16. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (*i. e.*, payment) is shown. The will is not overturned or revoked. It is satisfied.

We think the prayer of the bill should be granted, and the record should be remanded to the circuit court for the county of Wayne, in chancery, for further proceedings. Decreed accordingly.

The other Justices concurred.¹

¹ Cf. *In re Jaques*, L. R. [1908] 1 Ch. 267.

NOTE. — RESIDUE. An idea was at one time prevalent that a legacy of a residue could not be adeemed by a subsequent gift, and it was so held in *Clendenning v. Clymer*, 17 Ind. 155 (1861); but in *Thynne v. Glengull*, 2 H. L. C. 131 (1848), it was held that a covenant for a portion was satisfied by a residuary legacy in a will subsequently made; and in *Montefiore v. Guedalla*, 1 De G. F. & J. 93 (1859), it was held that a residuary legacy might be adeemed by a subsequent gift. Indeed, as LORD SELBORNE, C., points out in *Cooper v. Macdonald*, L. R. 16 Eq. 258, 267, 268 (1873), there is even more reason for supposing that a residuary legacy is adeemed, than for supposing that it is a satisfaction. He says: "There is (as was pointed out in the case of *Chichester v. Coventry*, L. R. 2 H. L. 71, in the House of Lords) a material difference in the practical application of the general rule of equity which presumes against double portions to children in cases of ademption and in cases of satisfaction. In the former class of cases the question is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself. In the latter it is (strictly speaking) a question

of testamentary intention only. When the question is one of testamentary intention, the fact that a gift of a share of residue is preceded by a direction that all the testator's debts shall be first paid may be evidence that a particular debt previously contracted in favor of a child is not intended to be paid out of that child's share of the residue. But when the question is as to the effect of a subsequent covenant to pay money for the benefit of a child, there is neither principle nor authority for the proposition, that this effect can depend upon or be influenced by the presence or absence in a prior will of any mere general provision for the payment of the testator's debts."

See also *In re Fickers*, 37 Ch. D. 525 (1888); *Van Houten v. Post*, 32 N. J. Eq. 709 (1880).

In *Meinertzen v. Wallers*, L. R. 7 Ch. 670 (1872), it was held that where the widow and children are residuary legatees, a subsequent gift to a child is to be considered as an ademption only for the benefit of the other children, and does not inure to the benefit of the widow.

SPECIAL PURPOSE. When a legacy is given for a special purpose, and the testator fulfils the purpose in his lifetime, the legacy is adeemed, although the testator is not standing *in loco parentis*. Thus where a testator gave "to the Newark City Mission" \$2,500, "to pay the debt on Belmont Avenue Chapel," and afterwards in his lifetime paid off the debt, which amounted to \$2,100, it was held that the legacy was wholly adeemed. *Taylor v. Tolen*, 38 N. J. Eq. 91, 96, 97 (1884). See *Pankhurst v. Howell*, L. R. 6 Ch. 136 (1870); *In re Pollock*, 28 Ch. Div. 552 (1885); *In re Corbett*, L. R. [1903] 2 Ch. 326; *Tanton v. Keller*, 167 Ill. 129 (1897).

CHAPTER V.

GRANT OF PROBATE AND OF ADMINISTRATION.

NOTE ON THE JURISDICTION AND PROCEDURE OF COURTS OF PROBATE.

I.

Courts having Jurisdiction.

In the earliest times the grant of probate and of administration took place, if at all, in the temporal courts. See 1 Thorpe, *Anc. Inst.* 413, 500; *Hensloe's Case*, 9 Co. 36, 38; 3 Seld. Op. 1667-1671, 1677, 1678. But the full and (with the exception of a few manorial courts) exclusive jurisdiction of the ecclesiastical courts in these matters was firmly established before the end of the fourteenth century. See Glanv. Lib. 7, c. 8; Mag. Cart. (John), § 27; St. 31 Edw. III. c. 11; Coote, *Ecc. Prac.* 21-58; 3 Seld. Op. 1678-1681; *Dyke v. Walford*, 5 Moo. P. C. 434.

The law administered by the ecclesiastical courts is the ecclesiastical law. 1 Thorpe, *Anc. Inst.* 495. This, at any rate since Henry VIII.'s time, has been the King's Ecclesiastical Law. St. 25 Hen. VIII. c. 21 (1533), Preamble. See *Queen v. Millis*, 10 Cl. & F. 534, 680 *et seq.* The *substantive testamentary law* seems to be largely of native growth. The contributions taken in England from the Civil Law concerned more the construction than the validity of wills; and next to nothing was taken in testamentary matters from the Canon Law. The *procedure*, however, in the English ecclesiastical courts was kept closely on the lines of the Canon Law.

The person who has independent jurisdiction in ecclesiastical courts over any territory is the *ordinary*. (He is usually the bishop.) According to the characteristic of the canon law, he can delegate his judicial authority, and generally does so to one who is called variously official principal, chancellor, commissary, or official. 3 Burn, *Ecc. Law* (9th ed.) 39; Co. Lit. 344 a; 2 Inst. 398.

England and Wales were divided into two provinces, Canterbury and York. Canterbury had twenty-two dioceses, and York five. In some, but not all, dioceses, there was one or more archdeaconries.

There were three classes of courts, —

I. Those not exempt from the usual appellate jurisdiction. Here an appeal lay from the Archdeaconry Courts to the Bishops' Courts, which were called Consistory Courts; from the Consistory Courts to the Provincial Courts of Appeal; and from the Provincial Courts of Appeal to the Court of Delegates.

The Consistory Courts had not only appellate jurisdiction from the Archdeaconry Courts, but also (concurrently with the Archdeaconry Courts, when any) original jurisdiction. Some bishops also had other courts which had jurisdiction (*semble* not exclusive of the Consistory Courts) over parts only of the diocese. From all the Bishops' Courts an appeal lay to the Provincial Courts of Appeal. In Canterbury the Court of Appeal was called the Court of the Arches, and the judge the Official Principal of the Arches; in York the Court was called the Chancery Court of York, and the judge the Official Principal.

From the Provincial Courts appeals lay to the Court of Delegates, which took the place of the appeal to Rome. This was a commission named for each case by the king, made up of common law judges, usually three, one from each Superior Court, and of from four to six doctors of the Civil Law. See Rep. Ecc. Com. 6. The court

announced its judgment without giving reasons. If it was equally divided, or if no common law judge was in the majority, commissions of adjunct were issued, until a majority with a common law judge in it was obtained. See 1 Lee, 239-241. Finally a commission of review might be granted, on recommendation of the Lord Chancellor, which was rarely given. See *Matheus v. Warner*, 4 Ves. 186. See Rep. Ecc. Com. App. 207-209.

II. The second class of courts included those exempt from the usual jurisdiction. These comprised (1) *Royal Peculiars*, where the appeal lay formerly directly to Rome. Appeal directly to the Delegates. (2) A few *manorial courts*, which still retained the power to grant probate and administration within a manor. Appeal directly to the Delegates. (3) *Peculiars* of deans, sub-deans, prebendaries, vicars, &c. *Parham v. Templar*, 3 Phillim. 223. Appeal directly to the Provincial Courts of Appeal. [N. B. There seem to have been some of these peculiars, which were exempt from the archdeacon's jurisdiction, but not from the bishop's.] (4) *Archdeacons' Peculiars*. (5) *Bishop's Peculiars*. (A) In his own diocese, exempt from the Court of the Archdeaconry in which they lay. (B) In another diocese, exempt from the jurisdiction of the bishop of that diocese, and from which appeals lay directly to the Provincial Courts of Appeal. 3 Burn, Ecc. Law, (9th ed.) 94, 95. (6) *Archbishop's Peculiars*. Some of the peculiars of the Archbishop of Canterbury (mainly in and near London) have a common court, called the Canterbury Court of Peculiars. The judge is called the Dean of the Arches; the office has often been held by the Official Principal of the Arches, *vide supra*, and the judge is more commonly known by the former title than the latter.

III. The third class of courts comprised the Prerogative Courts, one in each province. Here wills were proved and administration was granted when the deceased left goods in more than one diocese; *vide infra*. The appeal lay to the Delegates. The Prerogative were purely testamentary courts.

The judges of all ecclesiastical courts could appoint surrogates to sit in their place. The counsel in these courts were called advocates, and had to be doctors of the civil law. They were incorporated into a college, called Doctors' Commons; the proctors corresponded to attorneys.

In 1832 and 1833, by Sta. 2 & 3 Wm. IV. c. 92, and 3 & 4 Wm. IV. c. 41, the appeal to the Delegates from the ecclesiastical courts was taken away, and an appeal given to the Privy Council, acting through the Judicial Committee; in 1857, all jurisdiction in testamentary matters was taken from the ecclesiastical courts and given to a single Court of Probate, from which an appeal lay to the House of Lords; and the exclusive privilege of advocates and proctors was taken away. Under the Judicature Act "the Probate, Divorce, and Admiralty Division" is one of the Divisions of the High Court of Justice. An appeal lies to the Court of Appeal, and thence to the House of Lords. 36 & 37 Vict. (1873), c. 66, §§ 19, 31; 39 & 40 Vict. (1876), c. 59, § 3.

The regular series of reports in the ecclesiastical courts begins in 1809, though Lee's Reports contain opinions, generally brief, from 1752-1758, and the Appendix to the second volume has some cases from 1726-1732. There are very few cases in any other Reports before 1809. The cases are almost all in the Prerogative and Arches Courts of Canterbury and the Consistory Court of London. Instances of cases in other courts will be found, 1 Phillim. 201, 287; 2 Phillim. 403; 1 Add. 96, 124, 411; 1 Hag. Ecc. 48; 3 Hag. Ecc. 618, 726; 1 Curt. 447; 2 Curt. 376; 3 Curt. 338; 1 Notes of Cases, 315.

No process lay for the removal of cases from the ecclesiastical courts by *certiorari* or otherwise.

Mandamus lay from the Court of King's Bench to compel the judges of the ecclesiastical courts to grant probate of undisputed wills, or to grant administration according to the Statutes. *Rex v. Raines*, 1 Ld. Raym. 361; *Anon.*, 1 Stra. 552; *Rex v. Bettesworth*, 2 Stra. 857, 1118; *Smith's Case*, Ib. 891; *The King v. Dr. Hay*, 1 W. Bl. 640.

Prohibition was the common process to restrain proceedings in the ecclesiastical courts, usually for exceeding jurisdiction. If prohibition was not granted, a writ called

"a consultation" sent the case back. 1 Wms. Saund. 136-140. Each of the Superior Courts of Common Law could grant a prohibition. In *Gorham v. Bishop of Exeter*, a prohibition was sought in vain from the three Superior Common Law Courts in succession. 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630. On the question whether the Privy Council could be prohibited, see *Combe v. Edwards*, 3 P. D. 103; *Martin v. Macdonochie*, 4 Q. B. D. 697.

In every county of each of the United States there is a tribunal which grants probate and administration. Generally it is a separate court (though sometimes with the same judge as the County Court). Its most common title is Probate Court. In New York, however, it is styled the Surrogate's Court; in New Jersey, the Prerogative Court; in Georgia, the Court of Ordinary; in Pennsylvania and some other States, the Orphans' Court. Sometimes probate and administration are part of the business of the County Court.

An appeal lies, on matters of law, directly or indirectly, to the Supreme (or highest) Court of the State. That court seldom, therefore, has occasion to issue *certiorari*, *mandamus*, or prohibition.

II.

Facts necessary to give Jurisdiction.

The Alleged Testator or Intestate must have died. — See *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; and many other decisions and *dicta*. The only decision to the contrary, *Roderigas v. East River Savings Institution*, 63 N. Y. 460 (1875), is no longer law. *Same v. Same*, 76 N. Y. 316 (1879); *Scott v. McNeal*, 154 U. S. 34 (1894); *Matter of Killun*, 172 N. Y. 547, 557 (1902). See 1 Woerner, Amer. Law Adm. (2d ed.) § 208 *et seq.* On civil death by imprisonment for life, see *Knight v. Brown*, 47 Me. 468 (1859).

Locality. — In England, the ordinary of the locality where a testator or intestate died had jurisdiction to grant probate or administration. But if the deceased had *bona notabilia*, i. e., of the value of £5, within the province but outside the ecclesiastical limit in which he died, only the archbishop in his Prerogative Court had jurisdiction. If it was uncertain whether this last was the case, it was better to take out probate or administration in the Prerogative Court; for the archbishop had jurisdiction over the whole province, and therefore, although if there turned out to be no goods outside of the diocese or other ecclesiastical limit within which the deceased died, a prerogative probate or administration was irregular and voidable, yet it was good until set aside; while, on the other hand, if there were *bona notabilia* outside of the ecclesiastical limit in which the deceased died, probate or administration granted by the bishop or other ordinary was absolutely void.

If there were *bona notabilia* in both provinces, two probates were necessary.

On probate where there were *bona notabilia* in a peculiar, see *Lysons v. Barrow*, 2 Bing. N. C. 486; *Easton v. Carter*, 5 Exch. 8; and on the disputes between the archbishops and bishops on the question of the archbishop's prerogative, see Coote, Ecc. Prac. 61-86.

Since St. 20 & 21 Vict. c. 77, § 23 (1857), all jurisdiction has been in one court.

In the United States there is much variety in detail, but in general the Probate Court of the county where the deceased last dwelt has jurisdiction; and if the deceased dwelt out of the State, then the Probate Court of the county where he left assets, or, if there are more than one such county, then of that county in which jurisdiction is first taken.

There is great diversity of opinion in the United States on the question whether a grant of probate or administration in a wrong locality is void. See Smith (N. H.), 473, note.

Locality of Debts. — The locality of a simple debt is where the debtor lives, *Casebolt v. Casebolt*, Dyer, 305 a, *in marg.*; including bills of exchange and promissory notes, *Yeoman v. Bradshaw*, 3 Salk. 164; *Slocum v. Sanford*, 2 Conn. 533; *Chapman v. Fish*, 6 Hill, 554. *Contra*, *St. John v. Hodges*, 9 Baxt. 334. The locality of a bond debt is where the instrument in fact is. *Gurney v. Rawlins*, 2 M. & W. 87; *Beers v. Shannon*,

73 N. Y. 292. The locality of a judgment debt is where the judgment is recorded. *Daniel v. Luker*, Dyer, 305 a; *Adams v. Savage*, 2 Ld. Raym. 854. The locality of a lease is where the land lies, Dal. 77; of stock, where the stock-book is kept, *Arnold v. Arnold*, 62 Ga. 627; of the English Funds, in London, *Searth v. Bishop of London*, 1 Hag. Ecc. 625. But see *Wyman v. Halstead*, 109 U. S. 654.

III.

Procedure.

PROBATE is obtained either in common form or in solemn form.

It is obtained in *common* form on production of the instrument, and oath of the executor that he believes it to be the will. This is enough if the instrument is in regular form. But if it is not in regular form (or if, before the Wills Act, it was not attested), affidavits to prove execution are required.

Proof in solemn form, or per testes. — (1) The next of kin or other person interested in denying the validity of the will may enter a *caveat*, and the executor must then prove in solemn form. (2) The executor may *sua sponte* cause the next of kin, &c., to be summoned to come in and attend proof in solemn form. (3) The next of kin or a legatee interested under another will or codicil may after probate in common form cause the executor to be summoned to have the first probate annulled.

When a will is to be proved in solemn form the court directs both parties to file "affidavits of scripts," with all the writings under which they claim appended; and on the next court day these affidavits are filed. Coote, Ecc. Prac. 471-477.

The plaintiff, who is generally the executor, propounds the will, and then brings in his libel (or, as it is called in testamentary causes, his allegation), which comprises the positions and articles, *i. e.*, the matters to be answered by the defendant and by the witnesses. Langdell, Eq. Pl. §§ 16, 21, 25. This allegation may be opposed, which raises a question of law, the judge deciding whether the allegation is to be admitted, rejected, or reformed. Langdell, § 25. The other party puts in his personal answers under oath to the positions, and witnesses are examined on the articles, and cross-examined on interrogatories; then the other party puts in his allegation, the positions and articles of which are answered in like manner. When all the allegations are in, and the answers taken, then and then only the evidence is published. 3 Burn, Ecc. Law (9th ed.) 195; Langdell, §§ 25-29.

A hearing is had, and then judgment given in the form of an "interlocutory decree having the force and effect of a definitive sentence in writing." This differs from a definitive sentence only in the fact that the latter is signed by the judge, while the former is only a statement of the register. It has the same effect as a definitive sentence, and an appeal lies from it. 3 Burn (9th ed.) 207, 210, 211, 218; Coote, 631 *et seq.*

The proceeding in probate cases is now much simplified in England. In several of the United States the distinction between proof in common form (where the will is proved *ex parte*) and proof in solemn form exists. The proof in solemn form is sometimes in the Probate Court, sometimes by appeal to a higher court, sometimes by way of bill in equity to set aside the probate. See 1 Woerner, Amer. Law of Adm. § 215. In other States there is but one kind of proof. A common provision is that if there is no opposition, a will may be proved by one witness. Generally there are no pleadings in the probate courts in this country; when there are any, they are very simple. Evidence is given orally. When a case is tried by a jury, it is sometimes on an issue of *devisavit vel non*, sometimes as to particulars of competency or undue influence.

A lost will may be admitted to probate on proof of its contents on the evidence of one, and he an interested witness. *Sugden v. St. Leonards*, 1 P. D. 154. But see *Woodward v. Goulstone*, 11 Ap. Cas. 469.

In a few cases courts have stricken scandalous matter out of the probate, but they do so with hesitation and reluctance. See *Goods of Wartnaby*, 1 Rob. Ecc. 423;

Marsh v. Marsh, 1 Sw. & Tr. 528, 536 (1860); *Curtis v. Curtis*, 3 Add. 33 (1825); *Goods of Honeywood*, L. R. 2 P. & D. 251 (1871).

In England a copy of the will with a certificate, and called a probate, is given to the executor. It is the sole evidence of his appointment. In the United States letters testamentary are generally issued to the executor, and the will is recorded.

On including in the probate papers referred to in the will, see *Newton v. Seaman's Friend Soc.*, 130 Mass. 91 (1881), and cases cited. But see 1 Redf. on Wills, *267, note (41).

In *Haddock v. Boston & Maine Railroad*, 146 Mass. 155 (1888), probate of a will was granted sixty-three years after the death of the testatrix.

SECTION I.

APPOINTMENT OF EXECUTORS.

REX v. RAINES.

KING'S BENCH. 1698.

[Reported 1 *Ld. Raym.* 361.]

A MANDAMUS was directed to Sir Richard Raines, to command him to grant probate of the will of Edith Pinfold to one Richard Watts, who was made executor of it. Sir Richard Raines makes return to it, and admits that Edith Pinfold made her will, and Watts executor of it; but says further, *quod luculenter et judicialiter fuit probatum, et constat* to him, that Watts is worth nothing, but absconds for debt; and therefore that it is lawful to him to defer the granting of the probate until Watts find sufficient security to perform the intent of the will.

Sir Bartholomew Shower, *Mr. Montague*, and *Dr. Waller*, *Advocate-General*, against the *mandamus*.

Mr. Northey and *Mr. Eyre*, for the *mandamus*.

PER HOLT, C. J. Wills and testaments are of ecclesiastical consequence, not by force of the civil or canon laws (for they bind no farther here than as they have been received here), but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the King's Bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the King's Bench would grant a prohibition to stay any such suit; for all suits for distribution were prohibited by the King's Bench until the 22 & 23 Car. 2, c. 10, made them lawful. Dr. Waller has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though the refusal of the oath amounts to a refusal of the office of executor

(because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly which he is going to execute), yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right to require collateral security. Then the testament will continue in force, the ordinary cannot grant administration *cum testamento annexo*, and so there will be a failure of justice, nobody being capable to sue the testator's creditors. One half of what one finds in Linwood is not the law of the land. And as to the case of religious persons, objected out of Linwood, he said, that if a monk may be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior, by his leave given, is become security; and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And TURTON, Justice, agreed with HOLT, Chief Justice, *in omnibus*. But ROKEBY, Justice, seemed to be of opinion, that the grievance in the present case would be properly remedied by appeal. And he said, that in the province of York security was always given upon the granting of the probate of a will, without any dispute made about it. Upon which a day was given to Dr. Waller to certify the King's Bench, by producing precedents, whether the practice had been in the Prerogative Court to take caution in such case. At which day no precedent of it being shown, nor satisfaction thereof given to the court, HOLT, Chief Justice, with the concurrence of the other judges, pronounced the opinion of the court, that a peremptory *mandamus* ought to be granted in this case; because the ecclesiastical court cannot require caution in this case. 1. For when a man is made executor, nobody can add qualifications to him, other than those which the testator has imposed; but he shall be who, and in what manner, the testator shall judge proper. 2. The executor has a temporal right, of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster Hall. 3. There are no precedents in the canon law to warrant this, and the practice has been always contrary. And if any cases happen, in which equity may be requisite, there is another channel here, where it runs without resorting to the spiritual court, viz., chancery.¹

A peremptory *mandamus* was granted. And note, Mr. Robert Eyre told me, that the Lord Chancellor Somers well approved this resolution.²

NOTE. — DUNCAMBEAN v. STINT, 1 Ch. Cas. 121 (1669). — The defendant's testator gave the plaintiff £1,000, to be paid at the age of twenty-one years.

The bill suggested the defendant wasted the estate, and prayed he might give secu-

¹ The Court of Chancery did accordingly, on a bill filed, restrain Watts from interfering until he should have given security. s. c. Carth. 457, 458.

As to whether security may be required from an executor by the probate court in the United States, see 1 Woerner, Amer. Law Adm. (2d ed.) §§ 250-252.

² See *Hills v. Mills*, 1 Salk. 36 (1691); *Evans v. Tyler*, 2 Rob. Ecc. 128 (1799); *Clark v. Patterson*, 214 Ill. 533 (1905).

city to pay this legacy when due; and the MASTER OF THE ROLLS [SIR HARBOTTLE GRIMSTONE] did accordingly decree the defendant to give security.

HATHORNTHWAITE v. RUSSEL, 2 Atk. 126 (1740). — A motion for a receiver to be appointed by this court to collect in the money standing out upon several securities, and the rest of the assets of a testator, on a suggestion that the will was obtained by fraud, and that the sanity of the testator is now likewise contesting in the ecclesiastical court (see *Montgomery v. Clark*, 2 Atk. 378); affidavits, too, on the part of the motion were produced to show the mean circumstances of the two executors, and the counsel relied much upon the case of *Powis v. Andrews*, 2 Bro. Par. Ca. 476, where, upon a like motion, a receiver was appointed.

LORD CHANCELLOR [HARDWICKE] denied the motion, and distinguished it from the case of *Powis and Andrews*: there the fraud appeared very strong; the executors, too, were not related to the testator, took out a probate the very morning he died, and that very afternoon wasted and embezzled large sums of money which they got into their hands.

But here it is widely different; there are very strong affidavits produced on the part of the defendants to prove the sanity of the testator, and no circumstances to show that the executors used any unjust means, or prevailed upon the weakness of the testator, to make his will in their favor; besides, upon the very face of it, it is a rational will, for he gives away his estate in legacies to seven of his nearest relations, and has preferred the executors, who are as near of kin to him as the plaintiff himself, by making them residuary legatees.

Nor are there any grounds to grant this motion upon the other suggestions of the executors not being responsible, from their indigent circumstances; the court never esteems this as any ingredient to take the assets out of the hands and care of the executors, nor will even the ecclesiastical court refuse persons a probate because they are not of affluent fortunes, as long as the testator himself has placed this confidence in them without regarding their circumstances; besides, too, this case is materially different from *Powis and Andrews* in another respect; there is no probate here, so that, as the bulk of the testator's estate is placed out upon securities, the executors are not entitled to sue or bring any actions for them; this application, too, is not till a year after the commencement of the suit in the ecclesiastical court; for these reasons his Lordship denied the motion.

LANGLEY v. HAWK, 5 Madd. 46 (1820). — *Mr. Heald* moved for a receiver, and that the defendant, an executor and trustee, who had become bankrupt, might pay into court a sum of money acknowledged to be in his hands.

Mr. Rose, contra, stated, that proceedings had been taken to supersede the commission, which would probably be superseded, and that the defendant had more than sufficient for the payment of his debts; and that the testator knew a commission was issued against the defendant.

Mr. Heald, in reply. The will was made before the commission issued.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] The question simply is, Whether it is fit the court should now interfere for the protection of this property? Its interference can prejudice no right. I must consider bankruptcy, notwithstanding the petition to supersede, as evidence of insolvency; and from the will being made long before the commission, though not altered afterwards, I cannot satisfactorily infer, that this testator had a deliberate intention to intrust the management of his estate to an insolvent executor. I think it fit that a receiver should be appointed.

NOTE. — On executors by the tenor, or executors by implication, see *Pemberton v. Cony*, Cro. El. 164 (1589); *Naylor v. Stainsby*, 2 Lee, 54 (1754); *Boddicott v. Dalzeel*, lb. 294 (1756); *Grant v. Leslie*, 3 Phillim. 116 (1819); *Goods of Fry*, 1 Hag. Ecc. 80 (1827); *Goods of Oliphant*, 1 Sw. & Tr. 525 (1860); *Goods of Jones*, 2 Sw. & Tr. 155 (1861); *Goods of Baylis*, L. R. 1 P. & D. 21 (1865); *Goods of Punchard*, L. R. 2 P. & D. 369 (1872).

On the appointment of executors by substitution or nomination, see *Goods of Ligh-*
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ton, 1 Hag. Ecc. 235 (1828); *Goods of Cringan*, Ib. 548 (1828); *Goods of Deichman*, 3 Curt. 123 (1842); *Hartnett v. Wandell*, 60 N. Y. 346 (1875).

An executorship may be subject to a condition, *Alice Frances' Case*, *Dyer*, 3 b. in marg. (1581); may be limited in time, *Pemberton v. Cony*, Cro. El. 164 (1589); may be limited as to place, *Goods of Wallich*, 3 Sw. & Tr. 423 (1864); *Velho v. Leite*, Ib. 456 (1864); *Goods of Astor*, L. R. 1 P. D. 150 (1876). As to whether one can be an executor for a particular chattel or class or classes of chattels, see *Anon.*, *Dyer*, 3 b. (1527); *Austre v. Audley*, 1 Roll. Ab. 914 (1620); *Rose v. Bartlett*, Cro. Car. 292. 293 (1633); *Owen v. Owen*, 1 Atk. 494, 495 (1788).

SECTION II

ACCEPTANCE, RENUNCIATION, AND TRANSMISSION OF EXECUTORSHIP.

ANONYMOUS.

COMMON PLEAS. 1481.

[*Reported Year Book*, 21 Edw. IV. 23, pl. 8.]

DEBT brought by an executor of an executor in London on an obligation made to the first testator by the Earl of Kent.

Catesby [for the defendant], said that the first testator made him to whom the plaintiff alleges himself to be executor, and one J. B., fishmonger, his executors in London, by the same will; which said B. survived the other executor, and made A., his wife, executrix. And the said A. took to husband Sir William Monteforde, who are both in life, which matter, &c.

BRIAN, C. J. "You say more than is necessary, for it is enough to say that the first testator made J. B., and the other his executors, and that J. B. survived; and the rest is against your advantage." And he did not say why.

And then *Catesby* prayed to be advised of the parish and ward.

And on another day it was shown for the plaintiff that the plaintiff testator proved the will before the ordinary, and the said J. B. refused to prove it, whereby his testator administered alone the goods of the deceased, &c.

Collow [for the plaintiff]. "It seems to me that when J. B. refuses to prove the said testament before the ordinary, he will be estopped to administer afterwards, and he will not be charged by way of action as executor, wherefore it seems to me that the action is now maintainable as brought."

THE JUSTICES. "If twenty are named executors, and one proves the will, it is enough for them all, if the others will agree to it. And the refusal before the ordinary is no estoppel against them from administering afterwards when they please, in our law, and we have regard in this not to the law of Holy Church; and the other who proves the testament ought strictly [*de fine force*] to name those who refuse before

the ordinary in every action to collect a debt of the testator's, and they can sue with him, or they can be sued. And so although they never administer, their release will be a bar for the entire debt, and so it is clear that he who did not prove the testament, will have the action by survivorship, and that the plaintiff will be barred." And they also said that if A. makes B. [executor, and B.] proves the will and dies, the ordinary will sequester the goods of the said A. as well as the goods of B., for it is now as if the said A. had died intestate at the beginning. And so if the other executor who refused before the ordinary does not wish to administer, the ordinary can sequester.

Sulyard. Reddendo singula singulis, the first testator died intestate when his executor would not administer; the ordinary then could sequester and commit the administration to whomever he pleased.

And the opinion of all was that the plaintiff would be barred, notwithstanding the refusal of the other, &c. *Vide* 25 E. III. c. 5; *De purveyors*, 29 E. III. c. *ult.*¹

ISTED v. STANLEY.

1580.

[*Reported Dyer*, 372 a, pl. 8.]

WHERE the executor dies before the proving of the will, his executor cannot take upon himself the execution of the first will; but administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies performed) were bequeathed by his last will to the first executor; or to such other person or persons to whom the said residue is bequeathed; otherwise to the next of blood to the first testator, demanding it. And this (*ex relatione Doctoris Drury*, judge of the Prerogative Court of Canterbury) is the usage and custom of the said court, and agreeable to law (as seemed to him); to which the court gave credit.

¹ *Goods of Smith*, 3 Curt. 31 (1842), *accord*.

"And the court took this difference, when many are named executors, and some of them refuse, and some of them prove the will, those who refuse may afterwards at their pleasure administer, notwithstanding this refusal before the ordinary; but if all refuse before the ordinary, and the ordinary commits administration to another, then they cannot afterwards administer." — *Hensloe's Case*, 9 Co. 36 b, 37 a (1600).

But see *Anon*, *Dyer*, 160 b, pl. 42 (1558.)

But it has been determined on great consideration, that if one of two executors renounces, it is not necessary to cite him in on the death of the other executor, before appointing an administrator *cum testamento annexo*. The renunciation is considered as continuing after the death of the other executor, unless withdrawn. *Harrison v. Harrison*, 1 Rob. Ecc. 406 (1846); *Venables v. East India Co.*, 2 Ex. 633 (1848.)

WICKENDEN v. THOMAS.

COMMON PLEAS. 1611.

[Reported 2 Brownl. 58.]

THE case was this: Two executors were jointly made in a will; one of them releases a debt due to the testator, and after, before the ordinary, refuses to administer; and it was agreed by all the justices that the release was administration, and for that he hath made his election, and then the refusal comes too late, and so is void.

ANONYMOUS.

KING'S BENCH. 1675.

[Reported Freem. K. B. 288.]

B. DEVISES a legacy to C., and makes D. his executor, and dies; D. makes E., an infant, his executor, and dies, and administration is committed to F. *durante minore ætate* of E. C., the legatee, sues F. in the spiritual court for his legacy; and F. moves for a prohibition: but the court denied it; for although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *loco executoris*, and may be sued, as the executor of an executor may.¹

PARTEN v. BASEDEN.

COMMON PLEAS. 1676.

[Reported 1 Mod. 213.]

PARTEN brought an action of debt, in this court, against the testator of Baseden, the now defendant; and had judgment; after whose death, there was a *devastavit* returned against the defendant, Baseden, his

¹ Contra, *Limmer v. Every*, Cro. El. 211, as cited by Lord C. B. Gilbert in Bac. Ab. Executors, (B) 1 [2 vol. p. 381, 5th edit.]; but that case hardly supports him; and in Leonard's report of the same case under the name of *Limmer v. Every*, 4 Leon. 58, it is said only that such an administrator should sue as administrator of the first testator. s. c. cited Godolphin's Orph. Leg. p. 89; and see *Norton v. Molinæux*, Hob. 246. — SMIRKE'S NOTE.

executor: he appeared to it, and pleaded; and a special verdict was found to this effect:—

The defendant, Baseden, was made executor by his will, and dwelt in the same house in which the testator lived and died; and before probate of the will he possessed himself of the goods of the testator, prized them, inventoried them, and sold part of them, and paid a debt, and converted the value of the residue to his own use; afterwards, before the ordinary, he refused, and upon his refusal, administration was committed to the widow of the deceased.

The question was, Whether or no the defendant should be charged to the value of the whole personal estate, or only for as much as he converted?

Barrell, Serjt., for the plaintiff.

THE COURT was of opinion, that the committing of administration, in this case, is a mere void act. A great inconvenience would ensue, if men were allowed to administer as far as they would themselves, and then to set up a beggarly administrator; they would pay themselves their own debts, and deliver the residue of the estate to one that is worth nothing, and cheat the rest of the creditors. If an administrator bring an action, it is a good plea to say, That the executor made by the will has administered. Accordingly judgment was given for the plaintiff.¹

GOODS OF THORNTON.

PREROGATIVE COURT OF CANTERBURY. 1826.

[Reported 3 Add. 273.]

WILLIAM THORNTON, the party deceased in this cause, died in the year 1822; having made his will, and thereof appointed George Dodd and Charles Parsons, executors. In the month of October, 1822, administration, with the will annexed, issued to Margaret Thornton,

¹ "THE LORD CHANCELLOR [REDESDALE] observed, that some of these old cases could scarcely be supported on principle; they were decided whilst a great jealousy of the ecclesiastical court prevailed. That the meaning of the modern determinations was, that an administration granted after an executor having acted *in pais* might be repealed by an application to the ecclesiastical court; not that it was a mere nullity, unless as a protection to the executor. That it was true, an executor having acted, could not discharge himself from liability by such an administration being granted to another: but that a debtor to the fund could not in answer to a suit by such administrator, set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void, only as a protection to the executor, but in no other sense." — *Doyle v. Blake*, 2 Sch. & L. 231, 237 (1804).

In *Doyle v. Blake*, *ubi sup.*, and *Rogers v. Frank*, 1 Y. & J. 409 (1827), it was held that an executor who had intermeddled with the estate, and had afterwards renounced, was liable to the legatees in equity as executor.

On what constitutes intermeddling, see *Long v. Symes*, 3 Hag. Eco. 771 (1832).

widow, as the residuary legatee for life named in the will, on the renunciation of the said executors; and she was lately dead, leaving effects of the deceased unadministered. Mr. Parsons, one of the executors, upon this, retracted his renunciation; and the court was now moved by counsel, to admit this retraction, and to decree probate of the will of the deceased to Mr. Parsons, as one of his executors.

In support of the motion it was submitted, that an executor, after a renunciation, and probate or administration granted, had still a right to probate whenever a vacancy occurred in the representation of the deceased. After a probate granted, this was said to be recognized by the practice of the office, which was in the constant habit of permitting one of several executors who had renounced, after the death of his co-executors who had proved the will, to retract that renunciation, and to take probate, as a matter of course. It was now contended, on the authority of a passage in Mr. Toller's Law of Executors (vol. 1, c. 3 § 1), that the same right accrued to an executor, after administration, with a will annexed, granted, although the office, it was said, had objected to this, on the ground of the possible inconvenience that might accrue, in other quarters, from chains of executorship once broken, being thus suffered to revive. Should this deceased, for instance, it was objected by the office, have been the surviving executor of other testators, and should administrations have been granted of their effects, on the renunciation of his executors, if the chain of executorship were to revive, as now proposed, there would be double and conflicting representations of such testators; the one by grant of administration, as above; the other, by the revived chain of executorship.

THE COURT was of opinion, upon this state of facts, that the objection raised by the office was a valid objection — and there being, so far as appeared, no instance of, or precedent for, a grant of this description in the office, declined acceding to the motion.

It was then prayed, that administration with the will annexed might issue to Mr. Parsons, the executor; by which means the objection raised by the office would be obviated. This would preclude, it was said, a revived chain of executorship, and, consequently, the occurrence of the inconvenience suggested by the office; and still give the representation to the executor, who was submitted to be entitled to it. But,

PER CURIAM, Parsons is not the residuary legatee — the wife was residuary legatee for life only; and there is no residuary legatee substituted. Under these circumstances, as the next of kin are before the court, praying the administration, they have, clearly, I think, a preferable title to it.

Motion refused.

GOODS OF PERRY.

PREROGATIVE COURT OF CANTERBURY. 1840.

[*Reported 2 Curt. 655.*]

THIS was an application on behalf of the executor of an executor, to be allowed to renounce the probate of the will of the first testator, before taking probate of the will of the second testator. According to the ordinary practice of the office, the executor of an executor becomes, on taking probate of his will, the executor of the first testator.

Nicholl, in support of the motion.

SIR HERBERT JENNER. It has been for many years the practice in this court, that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will, and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed.¹

Motion rejected.

SECTION III.

EXECUTOR DE SON TORT.

STOKES v. PORTER.

COMMON PLEAS. 1559.

[*Reported Dyer, 166 b.*]

STOKES brought an action of debt on bond against Porter as executor of the will of one H. Wyrrol; the defendant pleaded *ne unques executor, ne unques administer come executor, &c.* The plaintiff averred that he administered as executor divers goods of the said H. W. &c., upon which issue was joined, and the jury found this special verdict, viz. "that the said H. W. at the time of his death was possessed of

¹ "There may, perhaps, be no case which expressly decides that an executor of a testator cannot renounce the executorship of other persons of whom his testator may have been executor, but I can remember that when I was at the bar the question was often raised, and the notion was always scouted. The principle is very plain that a person cannot accept one part of the duties of an executor, and refuse the rest. And if no case has been reported, it must be because every one thought the point too clear to be worth reporting."—*Per* LORD ROMILLY, M. R., in *Brooke v. Haymes*, L. R. 6 Eq. 25, 30 (1868).

Cf. Hayton v. Wolfe, Cro. Jac. 614 (1621); 1 Wms. Exec. (10th ed.) 199.

divers parcels of goods and chattels, and showed what in certain, and the value, as of his proper goods, and that after his death the defendant received of one I. D. seven pounds of a debt which he owed to the said H. W. in his lifetime, for which he made him an acquittance; and that also the defendant, after the death, and before the writ purchased, took and had in his hands all and singular the goods and chattels aforesaid, and the said seven pounds used, occupied, and disposed of at his will and pleasure to his own advantage and profit. And whether this use, occupation, and disposition be an administration in law, the jury pray the advice of the court, &c. and if it be, then they find that the defendant administered as executor, and assess damages and costs, &c." And it was debated at bar and at bench; and it seemed to us three, *s. H. BROWNE, A. BROWNE, and ME*, that it is sufficient administration. And first, the definition of the word administration is, an ordering, making, or a disposition, and more properly applied to an officer. And for a ground of the same argument I intend, that by occupation or possession, the goods of the dead give notice of the person who shall be charged as administering, be he ordinary or executor, and draw the charge to him, as debt against the dean only, guardian of the spiritualities during the vacancy of the fee, *ad cuius manus bona intestatoris devenerunt*, without the chapter, 17 E. 3 [Fitz. Ab. Tit. Bre. 822], T. 16 E. 2 [fol. 490], where the *devenerunt* was the issue. And see the Register, fol. 141, and 35 H. 6 [42 pl. 4], against the abbot of Saint Albans to whose hands, &c. and against one executor only, who had possession of the goods, the action well lies, &c. And in *M. [T.]* 8 E. 3 [52 b, pl. 42] in dower against one executor only who had the sole guardianship, it names him guardian and not executor; and that possession charges one as executor *de son tort demesne*, see 5 E. 4, in the Long Report, fol. 72, and 9 E. 4 [33 a, pl. 7], in debt against the executors, and 35 H. 6, fol. 42, by Moyle, and 50 E. 3, fol. 7 [b, pl. 15], and 33 H. 6 [31 b, pl. 5], where the wife took more of her apparel than was fitting for her degree without legacy or license, and it was holden an executorship *de son tort demesne*. And yet some possession is colorable, and still none in law to charge, &c. as expenses about the funeral; ¹ one made coadjutor or overseer; one who has *litteras ad colligendum*; ² a man who is made executor by a will, which will afterwards is disproved by the proving of one later; and a feme covert made executrix who does not intermeddle, &c. and renounces after the death of her husband: and all those cases where a man has color by any authority and law to intermeddle, he may plead the special matter, *sans ceo* that he administered in any other manner, &c. But where he claims title or interest in the goods as by gift of the testator in his life, he shall not say *sans ceo* that he administered any other goods or in any other manner, but *absq. hoc quoad ut executor*, 9 E. 4 [33 a, pl. 7], 10 H. 7, fol. 28 [b, pl. 19]. Also the plaintiff

¹ See *Camden v. Fletcher*, 4 M. & W. 378 (1838).

² See *Anon*, Dyer, 256 a (1566).

would be without remedy for his debt if he should not have the action above. And if a lawful executor mal-administer, *s.* by converting the goods to his own use, he shall be charged and shall be an executor by tort, and without authority by such malfeasance in many cases to avoid the charge would be unreasonable: and suppose the defendant himself in pleading had confessed the matter above found by the verdict *sans ceo* that he administered in any other manner, would he not be condemned? *Credo quod sic, &c.* And the receipt of the debt above is plainly a thing done as executor, for by no other color could he demand it; wherefore, &c. And afterwards before the next term, the defendant died before judgment given, wherefore the whole matter fell. But CATLYN, SAUNDERS, WHIDDON, and WRAY, were of opinion with the three judges above, H. 15, of the present Queen [Dyer, 225 b, pl. 8]; but MANWOOD, *e contra*.¹

STAMFORD'S CASE.

COMMON PLEAS. 1574.

[Reported 2 Leon. 223.]

THE case was, A. took a wife, and afterwards married Elizabeth Stamford, living his first wife, and by deed gave part of his goods to the said Elizabeth; and as to the residue of his goods, being but of small value, he made the said Elizabeth his executrix, and died; she refused the executorship, for which the ordinary committed administration to B. *Gawdy*, Serjeant, asked the advice of the court, against whom the action of debt should lie? for, if the creditor impleadeth the administrator, he hath not *assets*; if the executrix herself, she will plead that she hath renounced the executorship, and that administration is committed to B. And the opinion of DYER, Justice, was, That the gift is void by the common law, and also by the Statute of 13 Eliz., and then, if the gift be void any way, the creditor may have an action of debt against the said Elizabeth as executor of her own wrong: And see that such a gift is void by the common law, 43 E. 3, 2. And by MANWOOD, Justice, He who takes the goods of the dead, shall not be charged as executor of his own wrong, unless he doth something as executor: as to pay debts, make acquittances, &c. See 41 E. 3, 31; 32 H. 6, 7. DYER, If one takes the goods of the dead, and converteth them to his own use, he is chargeable as executor, and so it hath been adjudged in the time of this Queen, in the case of one *Stokes*, which was affirmed by *Bendloes and Harper*. See now Co. 2, Part 53,

¹ See *Bacon v. Parker*, 12 Conn. 212 (1837); *Taylor v. Moore*, 47 Conn. 278 (1879).

The executor *de son tort* of A.'s executor is executor *de son tort* of A. *McYrick v. Anderson*, 14 Q. B. 719 (1850).

Reade's Case; where no lawful executor, or administrator is, there, if a stranger takes the goods of the dead into his possession, the same is a good administration to charge him as executor of his own wrong.

BRADBURY v. REYNEL.

COMMON PLEAS. 1597.

[Reported Cro. El. 565.]

DEBT against him as executor of Tyrrel. The defendant pleads that Tyrrel died intestate, and that certain of his goods came to the defendant's hands, and afterwards administration was committed to J. S. to whom he had delivered the said goods. — *PER CURIAM*. It is not any plea; for if the administration had been committed to him, it would not have purged the first *tort*. So here, although administration is committed to a stranger, in regard that he hath once made himself chargeable to the plaintiff's action, as being executor *de son tort*, &c., he shall never afterwards discharge himself by matter *ex post facto*. Wherefore, &c. — *Adjournatur*. — *Et vide* 21 Hen. 6, pl. 1; 8, 9 Edw. 4, pl. 47; 2 Rich. 3, pl. 20.¹

READ'S CASE.

COMMON PLEAS. 1604.

[Reported 5 Co. 67.]

READ brought an action of debt against Carter executor of Yong, which plea began in the Common Pleas, Hil. 44 Eliz. Rot. 401. The jurors found, that the said Yong made his testament and last will, and made one A. his executor; and the day of his death was possessed of goods above the value of the debt in demand, and died; and before the will was proved the defendant took the testator's goods into his possession, and intermeddled with them; and afterwards, and before the writ purchased, the will was proved; and if on this matter the defendant should be charged as executor of his own wrong was the question.

¹ "If indeed, previously to an action brought against the defendants as executors *de son tort*, they had paid the money over to the rightful administrator, that would have been a good defence; because then they would have applied the money properly." — *Per BULLER, J.*, in *Padget v. Priest*, 2 T. R. 97, 100 (1787).

See *Anon.*, 1 Salk. 313, p. 427, note, *post*; *Curtis v. Vernon*, 3 T. R. 587 (1790); 2 H. Bl. 18 (1792).

So if an executor *de son tort* can prove a settled account with the rightful representative, before suit, it is a defence to a bill in equity for an account. So held by WOOD, V. C., in *Hill v. Curtis*, L. R. 1 Eq. 90 (1865). And on the jurisdiction of equity over suits against executors *de son tort*, see *Coote v. Whittington*, L. R. 16 Eq. 534 (1873); *Rousell v. Morris*, L. R. 17 Eq. 20 (1873); *In re Lovett*, L. R. 3 Ch.D. 198 (1876).

And on great deliberation judgment was given for the plaintiff. And in this case these points were resolved.

1. When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as executor; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor: yet it was resolved, and well agreed, that when no one takes upon him to be executor nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand: but although there be an executor who administers yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, there, for such administration as executor, he may be charged as executor of his own wrong, although there be another executor of right; and therewith agreeth 9 E. 4, 13.

3. In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will. Note, reader, these resolutions, and the reason of them, and by them you will better understand your books, which otherwise seem *prima facie* to disagree. 41 E. 3, 13 b; 50 Ed. 3, 9; 6 H. 4, 3 a; 11 H. 4, 83 b, 84 a; 13 H. 4, 4 b; 8 H. 6, 35 b; 19 H. 6, 14 b; 21 H. 6, 26 & 27; 32 H. 6, 7 a; 33 H. 6, 21; 21 E. 4, 5 a; 20 H. 7, 5 a; 26 H. 8, 7 b, 8 a; 1 Eliz. Dyer, 166; 9 Eliz. Dyer, 255. And so the *quære* in 1 *Mariae* Dyer, 105, 203, well resolved.¹

¹ ANONYMOUS, 1 Salk. 818 (1702). — *Per* HOLT, C. J. "If H. gets goods of an intestate into his hands after administration is actually granted, it does not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers the goods over to the administrator before the action brought, and then he may plead *plene administravit*. *Vide* 5 Co. 38. b. F. N. B. 44. But if he takes upon him to act as executor, he is chargeable to all events."

But see *Hall v. Elliot, Peake*, 86, 87 (1791).

One who wrongfully intermeddles after the death of the lawful executor or ad-

ALEXANDER v. LANE.

KING'S BENCH. 1608.

[Reported *Yelv.* 137.]

ALEXANDER brought debt on a bond of £40 against Lane as executor of P. The defendant pleaded, that P. in his lifetime was indebted to him in £40 just debt, and that goods to the value of £10 came to the defendant's hands, which he retained towards the satisfaction of his own debt; and averred, that *nulla bona plura* above goods to the value of £10 came to the defendant's hands to be administered, &c. The plaintiff replied, and showed that the defendant is executor *de son tort* to P. *et quod habet multa alia bona* of P. *administrand. apud S.* in the same county of Norfolk, and concluded, *et hoc paratus est verificare*, &c. The defendant rejoined, and demanded judgment, if the plaintiff should be received to say, that the defendant is executor *de son tort*; forasmuch as by the declaration he has affirmed him to be *executor testamenti*; and thereupon the plaintiff demurred in law. And as to the matter in law the whole court was with the plaintiff; for he may well reply, that the defendant is executor *de son tort*, notwithstanding the declaration; for there is no other form of declaration, as it is adjudged in *Coulter's Case*, 5 Rep. fol. 30. But PER TOT. CUR. the whole plea is discontinued; for the defendant having pleaded as to goods to the value of £10, which he retained for a debt, and that he had not *plura bona administrand.*, that is an offer of a good issue; then when the plaintiff replies, that he has *plura bona*, &c., and concludes *et hoc paratus est verificare*, it is not good; for he ought to have said, *et hoc petit quod inquirat. per patriam*; for now there is a surplusage of goods denied by the defendant, and urged by the plaintiff, which ought to come in issue, but cannot by reason of the ill conclusion. But in the same term between West plaintiff, and Lane defendant, where West demanded but £4 debt against Lane as executor, *ut supra*; and all the residue of the plea was, *ut supra*, judgment was given for the plaintiff, because the defendant had confessed goods in his hands to the value of £10, which is more than the debt demanded; and therefore forasmuch as by judgment in law an executor *de son tort* cannot retain to pay himself, although the other proceedings in the plea are ill, yet all that is out of the case, and judgment shall be given on the defendant's confession, and so it was. *Quod nota.* Yelverton of counsel *pro querente*.¹

ministrator is an executor *de son tort*. *Cottle v. Aldrich*, 4 M. & S. 175 (1815); *Williams v. Heales*, L. R. 9 C. P. 177 (1874). But see *Tonlin v. Beck*, T. & R. 438 (1823).

"If another man doth take the deceased's goods and sell or give them to me, this shall charge him as executor of his own wrong, but not me." Godolphin, Orph. Leg. Part II. c. 8 § 1 (h); approved in *Paull v. Simpson*, 9 Q. B. 385 (1846), and *Hill v. Curtis*, L. R. 1 Eq. 90, 97 (1865).

¹ See *Prince v. Rowson*, 1 Mod. 208 (1675).

In *Vaughan v. Browne*, 2 Stra. 1108 (1789), it was held that an administration granted, *pendente lite*, to an executor *de son tort* legalized his tortious acts, and gave him a right to retain for his own debt. *Andrew v. Gallison*, 15 Mass. 325 n. accord. But see *Whitehead v. Sampson*, 1 Freem. 265 (1679).

FLEMINGS v. JARRAT.

NISI PRIUS. 1795.

[Reported 1 Esp. 335.]

ASSUMPSIT for goods sold and delivered to the defendants.

Plea of, 1st, *Ne unques executor*. 2d, No assets come to the hands of the defendants.

The case in evidence was, that Peat the deceased, in his lifetime, being the owner of a certain ship, and having occasion for sails for her, they had been furnished by the plaintiff, who was a sail-maker, and they were not paid for at the time of his death; that after the death of Peat, the defendant had possessed himself of the ship, on which he claimed a lien; and the object of the action was to charge him for the price of the sails, as executor *de son tort*.

The delivery and price of the sails was proved.

Mingay, for the defendant, stated his defence to be, that every interference of a person with the effects of a person deceased would not make him executor *de son tort*, provided it was such interference as was consistent with a legal right of possession, which he claimed; that as to the possession of the ship on the present occasion, the defendant had been the ship's husband, and had taken possession of the ship by virtue of a *bona fide* assignment made to him by Peat, the deceased, in his lifetime.

He then gave in evidence the instrument by which the defendant was appointed the ship's husband. He afterwards proved, that the captain, having possessed himself of the ship, in Peat's lifetime, a suit had been instituted in the Admiralty by Peat, at the defendant's expense, to recover her; and in consideration of that and many other engagements, the defendant was then under on account of the ship, and of £250 paid, Peat had by his deed dated 24th September, 1791, assigned the ship to the defendant.

On this evidence, LORD KENTON said, he was of opinion, that the plaintiff [defendant] had made out a *prima facie* legal title to the possession as he claimed it, sufficient to exempt him from being charged as executor *de son tort*.

Erskine, for the plaintiff, insisted that the mere proof of the deed of assignment was not sufficient, as he ought to show a completely legal title. That Lord Hawksbury's Act having made an indorsement of the grand bill of sale necessary, such ought to be shown.

LORD KENTON said, that in a question of the nature of the present, he would not inquire whether the plaintiff [defendant] had conformed to all the requisites necessary to complete his title; that if the defendant came to the possession by color of a legal title, though he had not

made out such title completely in every respect, he should not be deemed an executor *de son tort*.

The plaintiff [defendant] had a verdict.

Erskine, Gibbs and Baldwin, for the plaintiff.

Mingay and Reuder, for the defendant.

Vide Read's Case, 5 Co. 33; *Anon.*, Salk. 313.

OXENHAM v. CLAPP.

KING'S BENCH. 1831.

[*Reported 2 B. & Ad. 309.*]

DECLARATION by an attorney, for work and labor, against the defendant, as the executrix of Francis Hunt Clapp. There were counts on promises by the deceased testator, and by the defendant as executrix. Plea, an outstanding bond, dated the 10th of March, 1793, conditioned for the payment of £600 by G. Clapp and Francis Hunt Clapp to one Locke; that Locke died; that one Mary Blake, the wife of Malachi Blake, was his executrix, and that the bond was unpaid at the death of Francis Hunt Clapp; that after the exhibiting of the plaintiff's bill, and whilst the defendant had leave to imparl to the same, to wit, on 27th of December, 1824, the defendant paid the amount of the bond to Malachi Blake and Mary his wife; and that the defendant had fully administered all the goods and chattels of Francis Hunt Clapp, except goods to the value of £270, which were not sufficient to satisfy the sum of £600. Replication, that the defendant was never executrix of the will of Francis Hunt Clapp, except of her own wrong, and that at the time of exhibiting the bill of the plaintiff, she, the defendant, as such executrix of her own wrong, had never been called upon to pay, nor had she as such executrix of her own wrong at any time been called upon to pay or paid the said sum of £600 supposed to be so due by virtue of the bond; and that she, the defendant, as such executrix of her own wrong at the time of the exhibiting the bill, had divers goods and chattels which were of Francis Hunt Clapp deceased at the time of his death, in the hands of her the defendant as such executrix as aforesaid, to be administered. Rejoinder, that after the exhibiting of the bill of the plaintiff, and whilst the defendant had leave to imparl to the same, and while the said principal sum of £600 was wholly due and unpaid, to wit, on the 27th of December, 1824, she, the defendant, paid the said principal sum of £600 to Malachi Blake and Mary his wife, as such executrix of the will of Locke as aforesaid. To this rejoinder there was a general demurrer and joinder.

Campbell, in support of the demurrer.

Manning, contra, was stopped by the court.

LORD TENTERDEN, C. J. There must be judgment for the defendant. This case is distinguishable from those cited, because here the defendant does not seek to take advantage of her own wrongful act. The cases cited show that an executor *de son tort* cannot avail himself of his own wrongful act in taking possession of the goods of the deceased in order to retain a debt for his *own benefit*; and on that ground the retainer set up in those cases was not allowed. But here the defendant pleaded, in answer to the plaintiff's claim, that *after* action brought she had disposed of the assets of the deceased in that course of administration which the law allows; viz. by discharging a debt of higher degree. And if at any time before plea pleaded an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor. I am not prepared to say that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff; because that might have been taking an undue advantage of her own wrong. It is sufficient in this case that the debt paid was a specialty debt, and that that sued for by the plaintiff was one by simple contract. And in many cases it may be very convenient, and even necessary, that an executor *de son tort* should dispose of the assets of the deceased in due course of administration.

LITLEDAL, J. I am of the same opinion. An executor *de son tort*, undoubtedly, cannot retain for his *own* debt, and the reason for that is assigned in *Coulter's Case*, 5 Coke, 31, "for from thence would ensue great inconvenience and confusion; for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such power, the law would be the cause and occasion of wrong, and of the wrongful taking of the goods of the deceased." But it is there also said, "that all lawful acts which an executor of his own wrong doth, are good." Now, by law, it is incumbent upon an executor to make payment of the debts of the deceased in a certain order, viz., to pay debts by specialty before those by simple contract. The payment of the bond debt in this case, therefore, was a lawful act. It appears to me to make no difference, whether the payment was made before or after action brought by the simple contract creditor. An executor under a plea of *plene administravit* may give in evidence, that before action brought he has exhausted the assets by payment of debts of the deceased not inferior to that of the plaintiff; but he must plead specially payment after action brought. Here the defendant has pleaded it specially, and it was a payment in due course of law.

PARKE, J. I am of the same opinion. The principle is, that an executor *de son tort* cannot by his own wrongful act acquire any benefit; for if he could, there would be a struggle among the creditors, and

each would contend to make himself executor in order to have the right to retain, which would produce great strife and confusion. He cannot, therefore, retain for his own debt in preference to that of another creditor. But he is protected in all acts not for his own benefit, which a rightful executor may do. Here between the time of the action brought and plea pleaded the defendant had notice of an outstanding bond, which in the due course of the administration of the assets of the deceased ought to be paid in preference to a debt by simple contract; and he made such payment: that was a lawful act, and as to that payment, he is protected. It is true that an executor *de son tort* cannot discharge himself from the debt of a creditor by delivering over to the rightful executor the assets, after action brought, because the creditor would thereby be in a worse situation; he would have to bring a second action against the rightful executor. But this is not such a case. Here the defendant has paid a bond debt in the due course of administration, and the creditor, therefore, could not afterwards maintain any action in respect of that debt against the rightful executor.

PATTESON, J. A wrongful and a rightful executor only differ in this respect, that the first is to take no benefit by his own wrongful act; as regards other creditors, there is no difference; an executor *de son tort*, as well as a rightful executor, may administer the assets in due course of law, and may, therefore, justify the payment of a bond debt, of which he has notice, before a simple contract debt.

*Judgment for the defendant.*¹

SHARLAND v. MILDON.

CHANCERY. 1846.

[Reported 5 Hare, 469.]

VICE-CHANCELLOR [SIR JAMES WIGRAM].² The widow of a deceased person, — the testator in the cause, — intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and in the course of doing so she employed the defendant Hewish to collect the debts owing to the testator. Hewish accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is, that the widow might without question be sued as executrix *de son tort*. The question is as to Hewish. The case of *Padget v. Priest*, 2 T. R. 97, appears to be an authority for the proposition, that if Hewish in this case had not paid over the money which he received, but had retained it

¹ See *Buckley v. Barber*, 6 Ex. 164 (1851); *Slate v. Henkle*, 45 Or. 430 (1904).

² The opinion only is given.

in his hands, he also might have been sued as executor *de son tort*. It does not appear clearly from the report of that case, whether that was the precise ground upon which the judgment went, but according to the marginal note it seems to have been the point decided. One judge, Mr. Justice Buller, however, appears to have expressed a doubt whether the party, if he had been a mere servant, would have been liable. The case, in the present instance, is one of great hardship on Mr. Hewish, and I desired to look into the cases, to see if I could avoid treating him as executor *de son tort*. The fact that he would be liable if he had received the money, and had not paid it over, is admitted, or well established; and if that be so, it seems to follow logically that the defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. Hewish might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly show that the doctrine, — that the possession of an agent is the possession of a principal, has no application to the case of a wrongdoer. *Stephens v. Elwooll*, 4 Mau. & Sel. 259; *Snowden v. Davis*, 1 Taunt. 359. Although, therefore, the rule operates severely in this case, Hewish, who in the act in question was a wrongdoer, must remain a party to the suit.

Mr. Greene, for the bill.

Mr. W. M. James, for the defendant.

THOMSON v. HARDING.

QUEEN'S BENCH. 1853.

[Reported 2 E. & B. 630.]

THE plaintiff sued as administrator of Alexander William Robert Bosville, deceased, for £2,654 6s. 6d., money payable by defendants to plaintiff for money received by them to the use of plaintiff as such administrator and for money due to plaintiff as such administrator on accounts stated between plaintiff and defendants.

“And the plaintiff, as such administrator as aforesaid, claims £2,654 6s. 6d., being compounded of the several sums of £906 12s., £747 14s. 6d., and £1,000, paid into the banking-house of the defendants by the late Richard Smith, the respective times of such payments appearing by the defendant's books. And the plaintiff will claim interest,” &c.

Plea: Never indebted. Issue thereon.

On the trial before *Cresswell*, J., at the Yorkshire Spring Assizes, 1853, it appeared that the intestate had an estate for life in lands let to various tenants. The defendants were bankers at Bridlington in Yorkshire; and the intestate kept an account with the bank. He was

in the habit of overdrawing his account largely : and, on 14th January, 1833, he executed a bond to the then partners in the bank, in the penal sum of £4,000, conditioned to secure such disbursements as they, or the partners for the time being, should make for him, not exceeding £2,000 in all. He died, on 23d September, 1847, being then indebted to the bank in above £2,000. Richard Smith, named in the last count, was for some years before and up to the time of the intestate's death, the collector of his rents ; and, from the rents so collected, R. Smith used, during the intestate's life, to pay sums into the bank to the intestate's account. After the intestate's death, R. Smith was continued in the employment as collector by the succeeding remainderman. After the intestate's death, R. Smith paid into the bank the three sums mentioned in the last count, which consisted of rents collected, accruing some before and some after the death of the intestate. The payments in respect of rents accrued before the intestate's death, and of the portion of rents due to his estate upon apportionment for the quarter current at the time of such death, did not together exceed the sum due from the intestate to the bank. At the time of the intestate's death one of the obligees of the bond, Edwin Smith, was alive : and Richard Smith, on making the last of the three payments (the £1,000), took back the bond from the bank. Richard Smith paid several other creditors of the intestate from rents accrued before the intestate's death, which he collected after the intestate's death. Subsequently to the making of these payments into the bank and to the creditors, administration was taken out, on 29th January, 1849. Richard Smith died on 2d September, 1849. The jury found, in answer to a question from the learned judge, that Richard Smith paid the three sums, mentioned in the last count, as in satisfaction of the debt owing to the bank from the intestate. On these facts the learned judge expressed an opinion in favor of the defendants : and the plaintiff was nonsuited, leave being reserved to move to enter a verdict for him.

In Easter Term. 1853, *Watson* obtained a rule accordingly. In Trinity Term, before LORD CAMPBELL, C. J., COLEBRIDGE, and CROMPTON, JJ.

Knowles and *R. Hall* showed cause.

Watson and *Stammers*, contra.

LORD CAMPBELL, C. J. I cannot doubt that there was abundant evidence of R. Smith having acted as executor *de son tort*. But there may be ground for considering whether that is enough to make valid all his acts, or whether, as Mr. Stammers argues, it should be shown that the party receiving the money had reasonable ground for believing that R. Smith was executor ; and, if so, whether that ought not to have been put as a question to the jury. I was struck with the difficulty pointed out in *Wentworth's Office of Executors*, 182, that a stranger might usurp the office of executor and destroy the election of the rightful executor. On the other side, there is the hardship to the creditor if rightful payments to him be not protected : and he would be protected, if the rule were that he might receive the money from one whom he had

reasonable ground for believing to be an executor. That view does seem, to a certain degree, to be countenanced by what is said in *Parker v. Kett*, 1 Ld. Raym. 661; *Read's Case*, 5 Rep. 33 b; and *Mountford v. Gibson*, 4 East, 441. But the point does not seem to have been made at the trial: and I do not know that we can notice it now.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court.

We are of opinion that the rule to enter a verdict for the plaintiff ought to be discharged.

Upon the evidence, it appears that R. Smith, employed to receive the rents of the deceased in his lifetime, after his death continued to receive rents due to him in his lifetime, and, no other representative of the deceased appearing, paid various debts due from the deceased. The defendants were the bankers of the deceased. And the jury found that R. Smith paid them the sums sought to be recovered, to satisfy a debt due to them from the deceased. A considerable time afterwards, administration was granted to the plaintiff; and the present action was brought.

We are by no means of opinion that, as against a person who becomes the rightful representative of a person deceased, every payment from the assets of the deceased shall be valid, if made by a person who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor *de son tort*. This he may do, according to the old authorities, by taking a dog or milking a cow of the deceased; and he may clearly do wrongful acts, which would render him liable to be sued as executor *de son tort*, without giving validity to his alienation of the property of the deceased; "for then any stranger might usurp the office of executor, and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor the power to pay himself before others, in case there were a debt due to him, which were very unreasonable," Wentworth's Office of Executor, 182. "A single act of wrong in taking the goods of the intestate, though it may be sufficient to make the party an executor *de son tort* with respect to creditors who may choose to sue him in that character, yet will not give him any right to retain them as against the lawful administrator." "When it is laid down generally that payments made in the due course of administration by one who is executor *de son tort* are good, that must be understood of cases where such payments were made by one who is proved to have been acting at the time in the character of executor." "An act" "may be well sufficient to charge the party himself as executor *de son tort*, which would not be sufficient to justify a wrong-doer claiming title under it." So the law is expounded by Lord Ellenborough in *Mountford v. Gibson*, 4 East, 445, 446, 447. But, where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property. Says Lord Holt, in

Parker v. Kett, 1 Ld. Raym. 661 : "The reason is, because the creditors are not bound to seek further than him who acts as executor ; therefore, if an executor *de son tort* pays £100 of the testator's in a bag to a creditor, the rightful executor shall not have trover and conversion against the creditor."

In the present case, R. Smith may be considered as acting in the character of executor, seeing that for months he administered the assets of the deceased ; and the defendants, when the payments were made to them by him in satisfaction of their debt due to them from the intestate, might reasonably have supposed that he had authority to make the payments.

This being taken as a fact (and there was no desire expressed at the trial that it should be left to the jury), we are of opinion that the non-suit was right.

Rule discharged.

PERKINS v. LADD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[Reported 114 Mass. 420.]

TORT, brought by the administrator of the estate of Frank A. Rolfe, for the conversion of two horses belonging to the estate.

At the trial in the Superior Court, before *Lord, J.*, there was evidence to show that the plaintiff's intestate, an officer in the United States army, was killed in the battle of the Wilderness in 1864 ; that his horses, sword and various other articles were sent by the general of the army to Washington, D. C., directed to the care of the defendant, a paymaster in the United States army, who forthwith forwarded all the articles, except the horses, to the widow of the deceased at Lawrence, Mass., where she then resided ; that the horses were sick and diseased and in bad condition ; that they were put in a stable under the charge of a stablekeeper, and that the defendant sought of the widow directions as to what disposition should be made of them ; that she thereupon directed him to have them sold at Washington, and to send her the proceeds ; that the defendant, in accordance with her directions, employed an auctioneer to sell them for her at public auction, and sent her the proceeds, which she received ; that the stable-keeper's charge for keeping was \$1.00 per day for each horse ; that the defendant never acted or claimed to act concerning the horses except in accordance with the directions of the widow ; that he never had any personal benefit from the horses or the proceeds, and that he charged nothing for his services ; and that these transactions all took place within a few weeks of Rolfe's death.

The plaintiff contended that the defendant acted for himself, and that

he neither was, nor could be, justified in what he did touching the disposal of the horses by any power which the intestate's widow did or could confer upon him. He also contended that the sale was a pretended one, made pursuant to a secret arrangement between the defendant and the auctioneer, by which the possession of the horses, or of one of them, passed to the defendant, in fraud of the plaintiff's intestate's estate.

The court instructed the jury that under the laws of Massachusetts the widow was *prima facie* entitled to administer upon the estate of her deceased husband; that if Mrs. Rolfe, immediately upon knowing that the effects of her deceased husband were in the care of the defendant at Washington, requested him to act in reference to them in her behalf, and he did so act in good faith (said property being perishable in its nature), and made the sale as her agent and at her request, and in all respects accounted with her for all which he received, that he was not liable; but that if he undertook in any manner to act in his own behalf, or to secure for himself directly or indirectly any benefit from the sale of the horses, or if there was any secret arrangement or understanding between himself and the auctioneer that he was to become possessed of one or of both the horses under a pretended sale, then the action might be maintained, and he would be liable for the value of the horses to the present plaintiff.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

C. Cowley, for the plaintiff.

D. S. and G. F. Richardson, for the defendant.

DEVENS, J. The rights of the plaintiff, who seeks to recover here for an alleged conversion of the property of his intestate, must be governed by the principles which would control in an action for wrongful intermeddling with the estate by one who it was claimed had thereby rendered himself liable as executor *de son tort*. Under Gen. Sts. c. 94, § 14, any one intermeddling injuriously with the estate of a deceased person without being thereto authorized by law, is liable to the persons aggrieved as an executor in his own wrong; and by section 15 of the same chapter, every executor in his own wrong is liable to the rightful executor or administrator for the full value of the goods taken by him, and for all damage caused by his acts to the estate of the deceased.

Upon the evidence in the case, the defendant was rightfully in possession of the horses, the value of which is sued for, the intestate having been an officer of the United States army, killed at the battle of the Wilderness in 1864, and his effects having been, by the direction of the commanding general, placed in charge of the defendant, who was then a paymaster in the army. Under the instructions, the jury must have found that, upon being informed that the effects of the intestate were in the care of the defendant at Washington, his widow requested him to act for her in reference to them; that he did so in good faith; that, the property being perishable in its nature (consisting of horses diseased

and in bad condition, which could only be kept at great and disproportionate expense), he, in compliance with her directions, sold them and remitted to her the proceeds; and that he in no manner acted in his own behalf, nor in any way, directly or indirectly, secured to himself any benefit from the transaction.

The acts of the defendant, upon which it is sought to charge him, were done in 1864, and it would be unfortunate in the present case if the general principles of law were such as to compel us to charge the defendant (who appears to have acted throughout with the honorable purpose of saving the effects of a fellow soldier, and neither to have asked nor received compensation for his services) with liability in a suit brought so long after the transactions referred to. We are of opinion that they do not so compel us, and that the ruling under which a verdict was rendered for the defendant is not open to exception.

Upon the death of a person, a short time must necessarily elapse before title to his personal property can be acquired by the issue of letters testamentary or of administration. Within this period, however, many acts must be done if such property is to be suitably preserved. Goods must be stored, animals fed and cared for, and perishable property must be disposed of. As by Gen. Sts. c. 94, § 1, the widow, or next of kin, or both, as the Probate Court shall see fit, are entitled to the administration, no person can be more suitable than the widow to take such temporary charge of the property. We are to consider whether one who aids her in this, acting simply as her servant and agent, becomes liable for the value of the goods which he thus assists her in caring for, and, when the property is perishable, in disposing of.

It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. This was carried to such an extent, that a wife has been held liable as executrix *de son tort* for milking the cow of her deceased husband. *Gerret v. Carpenter*, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as locking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, &c., for these are necessary acts of kindness and of charity. 1 Williams on Executors (4th Am. ed.) 214, and cases there cited. *Camden v. Fletcher*, 4 M. & W. 378.

In *Padget v. Priest*, 2 T. R. 97, Mr. Justice Buller intimates that if the defendant had acted merely as the servant of another, he should not be held liable. In *Brown v. Sullivan*, 22 Ind. 359, it was held that taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, did not make one liable as executor *de son tort*. In *Givens v. Higgins*, 4 McCord, 286, it was held that one acting as agent for the widow, and not knowing in what character she was acting, would be considered as her agent merely, and not as exercising such control over the funds of the estate as to make himself liable. In this case the defendant had, by direction of the widow, transferred certain property of the deceased in payment of one

of his debts. In *Magner v. Ryan*, 19 Missouri, 196, it was held that a person who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate, which he had done merely as the servant of another.

Both these last cases go much further than the present case, and perhaps further than we should be willing to go. The rules against intermeddling with the estates of deceased persons are important, as the interval of time between the decease and the appointment of an administrator affords opportunities of which evil disposed or even intrusive and officious persons should not be allowed to take advantage, by interfering with the administration of the person who may thereafter be appointed. When, however, one can show (and this is all that it is requisite in order to sustain the ruling of the presiding judge) that he has acted in good faith, at the request of the party entitled to administration, in doing an act in disposing of perishable property apparently necessary for the purpose of having its proceeds reach those entitled to them, and has paid over the proceeds to the party at whose request he has thus acted, he is not responsible for a wrongful conversion of the property.

Exceptions overruled.

ROHN v. ROHN.

SUPREME COURT OF ILLINOIS. 1903.

[Reported 204 Ill. 184.]

APPEAL from the Branch Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Louis A. Heile, (*J. S. Huey*, of counsel,) for appellant.

Henry P. Heizer, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee, Ida Rohn, as administratrix of the estate of her deceased husband, William Rohn, Jr., recovered a judgment in the Superior Court of Cook county for \$1762.50 against appellant, William Rohn, father of said William Rohn, Jr., as executor *de son tort* of said estate, in an action on the case for negligence in failing to collect a note of \$1500 against George Wildner, which appellant had in his hands. The Branch Appellate Court for the First District affirmed the judgment.

The material facts appearing on the trial are as follows: William Rohn, Jr., was a partner of George Wildner in the manufacture of furniture in Chicago, and having long been ill with a fatal disease, he attempted to arrange his business affairs and property in view of his approaching death. He had no real estate and no debts, and was averse to having his estate probated. To carry out his arrangement he entered into a contract with Wildner for the sale of his interest in

the partnership to Wildner for \$8500, on which \$6000 was to be paid in cash or securities and Wildner was to give his notes for the remainder, one for \$1000 and the other for \$1500. Wildner had \$1600 in mortgages and was going to raise \$400 to make up \$2000. He arranged to borrow \$2000 from his mother and \$2000 from Rudolph Rohn, brother of the defendant, for the purpose of paying the \$6000. William Rohn, Jr., executed a bill of sale of his share of the partnership, dated September 28, 1893, and gave it to his wife, Ida Rohn, to be delivered upon compliance with the terms of sale. When the contemplated sale should be carried out his estate would amount to \$11,000, which was all in personal property, and he said that he wanted to secure to his wife \$5000 of that sum and to each of his children \$3000; that he wanted to leave all his effects in the care of his father, the defendant, in whom he had perfect confidence. He died October 10, 1893, and on October 17, 1893, the defendant, in pursuance of the arrangement, took the bill of sale and delivered it to Wildner, receiving from him \$6000 and two judgment notes payable to Ida Rohn, under the name of Mrs. William Rohn, Jr., one for \$1000, due in two years, and the other for \$1500, due in three years. The \$6000 was raised by Wildner as above stated. The defendant gave to Ida Rohn, the widow, a list showing the two notes and other securities, aggregating \$11,000, which was the entire estate left in his custody, as requested by the deceased. She then went with a friend and the defendant to an attorney's office, where she said that her husband was dead and it would be better to get things into proper shape in accordance with his will; that he wanted her to have \$5000 and each of the children to have \$3000, and she wanted a document drawn up to have the transaction shown in case anything should happen, and to show that defendant held the property. The attorney drew up, according to her directions, a declaration of trust, by which defendant acknowledged that he had received from his son, William Rohn, Jr., \$11,000 in notes, partly secured and partly unsecured, which he held in trust for Ida Rohn and her two minor children, in the proportion of \$5000 for the former and \$3000 for each of the latter. He agreed to collect interest on all the securities and pay the same to Ida Rohn during the minority of the children; to turn over her share of \$5000 on demand, and \$3000 to each of the children when they became of age. This declaration was signed by the defendant. He attended to the collection of the principal and interest on the securities as they matured, without any compensation, under the agreement. The \$1000 note of Wildner was paid at maturity. Two annual payments of interest were made on the note of \$1500, and that note matured October 17, 1896, and was not paid when due. Defendant's brother, Rudolph Rohn, had furnished said sum of \$2000 when Wildner purchased the interest in the partnership, and the indebtedness had been increased to \$3000, for which Rudolph Rohn had taken a chattel mortgage on the property in the spring of 1896, and Wildner also owed Rudolph Rohn nearly two years' rent. In the latter part of October, 1896, the defendant and Rudolph Rohn went to Wildner, and defend-

ant requested payment of the note to the estate. They both wanted Wildner to pay them, and he asked for time, showing them his stock and telling them he was looking for a partner and was able to pay everybody. He asked them to wait until after the election, in November, when he would get a partner or make a stock company and would see that they were protected. There was no agreement for any extension, but neither the defendant nor Rudolph Rohn took any steps to enforce collection. In November Wildner's mother, who had loaned him \$2000 to make the purchase, entered judgment on her note. Rudolph Rohn, learning that fact, paid the judgment to her and foreclosed his chattel mortgage, leaving Wildner insolvent, and the \$1500 note could not be collected. Plaintiff was appointed administratrix of her husband's estate on January 26, 1897, and on August 13, 1897, she endorsed upon the declaration of trust a receipt for \$9500 in cash and all interest thereon to that date.

The defendant took charge of the property in entire good faith, without compensation, solely for the purpose of carrying out the wishes of his son. The only question of fact in controversy in the case was whether defendant was guilty of negligence in not entering judgment on the note and making an effort to enforce collection by that means.

The arguments of counsel on both sides are directed almost exclusively to the facts, but the judgment of the Appellate Court must be treated by us as finally settling the fact that the defendant was guilty of negligence in not exercising such diligence for the collection of the note as a man of ordinary prudence would have exercised in his own affairs, and also that the loss and damage to the estate was equal to the damages assessed.

The assignments of error which we may consider relate to the giving and refusing of instructions. There were only two instructions given at the request of plaintiff, and objection is made to them on the ground that they erroneously assumed that defendant, when the note became due, occupied the position of executor *de son tort* of his son's estate, while the evidence showed that he acted simply as a trustee for Ida Rohn and her two children, individually. What facts will constitute an executor *de son tort* of an estate is a question of law for the court, but the determination of the facts, if they are in controversy, is for the jury. In this case there was no controversy whatever as to the facts creating the relation of defendant to the estate. The defendant received all the property of the estate, consisting of \$11,000 in notes and securities, of which the widow was, under the statute, entitled to one-third and the children to the balance, in equal shares. The arrangement by which the contract with Wildner had been carried out was for the benefit of the estate and in the interest of the minor children, and has not been questioned by anybody. The defendant having taken the estate into his possession and assumed its management, was bound to hold and account for it in the proportions fixed by the statute. No doubt the widow and the defendant honestly believed that by reason of

the expressed wish of the deceased his estate could be divided as they attempted to divide it, and that the property could be placed in the hands of the defendant in a trust relation, as requested by the deceased, but they were both bound to know the law, and that the deceased could not change the distribution of his estate under the statute without a will, as he attempted to do. It is true that the declaration of trust was made at the request of Ida Rohn, and that the services of defendant were performed in good faith, with no other motive than to carry out the wishes of his deceased son, but the arrangement was void in law. Ida Rohn was entitled, as widow, to one-third of the estate and the minor children each to one-third, and neither she nor defendant could increase her interest to \$5000. The parties were wrong in their supposition that the arrangement was binding upon the minor heirs, and the undisputed facts placed the defendant in the position of an executor *de son tort* of the estate. He was bound to exercise, so far as the estate was concerned, the same diligence in the collection of the note as if he had been a regularly appointed administrator, and there was no error in assuming that he occupied the same position and assumed the same responsibilities and liabilities as an administrator. The court refused instructions, asked by defendant, to the effect that acts of kindness, beneficence and charity do not amount to a usurpation of the office of administrator and do not create a liability against any person. The acts done merely from kindness and charity, and for no other purpose, which do not create a liability, as we understand it, are limited to such acts as directing a funeral, payment of funeral expenses and the preservation of the estate from loss or waste, and the like, while in this case the entire estate was taken by defendant for management and distribution, including everything, in substance, that an administrator would be bound to do, but different from the provisions of the statute. The court did not err in refusing the instructions referred to.

It is further urged that the court erred in refusing to give instructions, asked by the defendant, advising the jury that if the arrangement was concurred in by the plaintiff, and the defendant held the note, with the other property, for the use and benefit of the widow and heirs of William Rohn, Jr., with the knowledge and acquiescence of the plaintiff, she would be estopped from charging him as executor *de son tort*, and that he would have the right to apply the note to her distributive share of the estate, which exceeded the amount of the note. We think the court was right in refusing these instructions. In law the plaintiff represented the estate, suing as administratrix, and the only judgment at law would be for or against the defendant on the alleged liability to the estate. Counsel have pointed out no method by which a set-off or counter-claim could be interposed in a suit at law or any estoppel be made effective against the plaintiff, representing the estate. A court of equity might look beyond the parties and determine the case upon their true relations and adjust the equities of all the parties. The minor children could not be required to bear any part of the loss, and in this suit

the court could not apportion it. A court of equity may assume jurisdiction of the settlement of an estate, and in this case there was nothing to adjust except the interest of the distributees. If facts existed requiring that, as between the defendant and the widow, the loss ought to be taken from her distributive share of the estate, it cannot be done in this suit, and such relief must be sought in a court of equity. Whether she, as an individual entitled to a distributive share of the estate, was in any manner responsible for his failure to collect the note is not a question in this case, and there was no error in refusing the instructions asked by defendant.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

NOTE. — Where there is no dispute as to the facts, the question whether one is executor *de son tort* is for the court, not the jury. *Padget v. Priest*, 2 T. R. 97 (1787).

A widow paying out her husband's money in support of the family "before any certain knowledge of his death" is not an executrix *de son tort*. *Brown v. Benight*, 3 Blatchf. 39 (1832). Cf. also *Brown v. Leavitt*, 26 N. H. 493 (1853); 1 Woerner, Amer. Law of Adm. § 198.

SECTION IV.

GRANT OF ADMINISTRATION.

ST. 13 EDW. I. (WESTM. II., 1285) c. 19. — Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; (2) the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

ST. 31 EDW. III. (1357) c. 11. — Item, it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the king's court, for to administer and dispend for the soul of the dead; (3) and shall answer also in the king's court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer. (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come.

ST. 21 HEN. VIII. (1529) c. 5, §§ 3, 4. — § 3 . . . (6). And in case any person die intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary, or

other person or persons having authority to take probate of testaments, as is abovesaid, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them, to whom shall be made such commission, for the true administration of the goods, chattels, and debts, which he or they shall be so authorized to minister; (7) And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where indeed divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or mo making request, where divers do require the administration.

§ 4. Or where but one or more of them, and not all being in equality of degree, do make request, then the ordinary to admit the widow, and him or them only making request, or any one of them at his pleasure. . . .

ST. 29 CAR. II. c. 3, § 25 (1677). — And for the explaining one Act of this present Parliament, intituled, *An Act for the better settling of intestates' estates* [22 & 23 Car. II. c. 10 (1670)]. (2) Be it declared by the authority aforesaid, that neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act.

NOTE. — GENERAL ADMINISTRATION. When the ecclesiastical courts first obtained jurisdiction to administer the estates of intestates (see note, page 411, *ante*), the ordinaries kept the administration in their own hands.

It has been said that, at common law, if the ordinary took possession of the goods of the intestate, the creditors could compel him to apply them to the payment of debts. *Snelling's Case*, 5 Co. 82 b (1597); *Hensloe's Case*, 9 Co. 86 b, 89 b (1600). The statute of 13 Edw. I. c. 19, *supra*, expressly imposed this obligation upon the ordinaries.

If an intestate left a widow and issue, *semble*, that the widow was entitled to a third of the estate, and the issue to a third. If he left a widow but no issue, or issue but no widow, that the widow, or issue, were entitled to a half of the estate. See *Mag. Cart.* (John) c. 26; *Fitz. Nat. Brev.* 122; *Dyke v. Walford*, 5 Moore P. C. 434, 490 (1846). But it is not clear that the widow and issue had any sufficient remedy for the recovery of these shares (*partes rationabiles*) from the ordinaries. *Dyke v. Walford*, 5 Moore P. C. 434, 492.

Such portions of the estates as were not paid to the creditors, or to the wife and issue, the ordinaries usually, if not invariably, applied to pious uses.

The statute of 31 Edw. III. c. 11, *supra*, took out of the hands of the ordinaries the administration of the estates of persons dying intestate, but with kin. The object of this statute was to take the administration from the ordinaries, rather than to define with precision the persons to whom the grant of administration must be made.

If a *feme covert* died, her husband was entitled as of right to administration. This right has been said to arise from the statute of 31 Edw. III, *supra*. *Jones v. Roe*, W. Jones, 175 (1628); *Fortre v. Fortre*, 1 Show. 351 (1692). It has also been said to

be independent of any statute. *Watt v. Watt*, 3 Ves. Jr. 244, 246 (1796). The right was expressly recognized and confirmed by the statute of 29 Car. II. c. 3, *supra*. And see *Elliott v. Gurr*, 2 Phillim. 16, 19 (1812).

In *Allen v. Humphrys*, L. R. 8 P. D. 16 (1882), a husband had agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property. She died intestate, leaving property of which she had become possessed by virtue of the deed, and the court, notwithstanding that the husband objected, granted letters of administration to her father, limited to that property. And see *Goods of Pountney*, 4 Hagg. Ecc. 289 (1832). Cf. *O'Rear v. Crum*, 135 Ill. 294 (1890).

The absolute right of the husband to administration is common, but not universal, in the United States. 1 Woerner, Amer. Law Adm. (2d ed.) § 236.

If the husband died after the wife without taking out administration on her estate, the ecclesiastical courts formerly granted administration to the next of kin of the wife. *Goods of Gill*, 1 Hagg. Ecc. 341 (1828). But the practice has now been changed, and, wherever the wife has predeceased her husband, the probate court grants administration to the representatives of the husband. *Fidler v. Hanger*, 3 Hagg. Ecc. 769 (1832); *Partington v. Atty. Gen.*, L. R. 4 H. L. 100, 109 (1869). See *Hendren v. Colgin*, 4 Munf. 281 (Va. 1814).

The widow did not have the absolute right to the administration of her husband's estate. St. 21 Hen. VIII. c. 5, *supra*. Letters are, however, usually granted to her. *Stretch v. Pynn*, 1 Cas. temp. Lee. 30 (1752); 1 Woerner, Amer. Law Adm. (2d ed.) § 237. Cf. *Goods of Stevens*, L. R. [1898] P. 126. But not if she has barred herself of all interest in her husband's personal estate. *Walker v. Carless*, 2 Cas. temp. Lee. 560 (1758); *In re Davis*, 106 Cal. 463 (1895).

If letters are not granted to the surviving spouse, they will usually be granted to one or more of the next of kin. As to the usual method of ascertaining the next of kin, see 1 Wms. Exec. (10th ed.) 328-334, where, in recapitulating the subject, it is said: "In the first place the children, and their lineal descendants to the remotest degree: and on failure of children, the parents of the deceased are entitled to the administration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins."

In *Young v. Peirce*, 1 Freem. 496 (1689), A died intestate, leaving a son B and a daughter C. C assigned all her interest in the estate to B, and received the full consideration for her assignment. B made D his executor, bequeathed to him all his personal estate, and died. C asked for administration of the estate of A as his next of kin, but letters were granted to D, because D "was in equity entitled to all benefit of the personal estate" of A. And see *Thomas v. Butler*, 1 Vent. 217, 219 (1672); *Withy v. Mangles*, 10 Cl. & Fin. 215, 248 (1848).

If there are no next of kin, the patentee or nominee of the Crown is usually appointed. In *Manning v. Napp*, 1 Salk. 37 (1692), it was held that the patentee of the Crown had no absolute right of appointment, but in *Dyke v. Walford*, 5 Moore P. C. 434 (1846), the Privy Council held that the beneficial interest in the property, after the payment of debts, was in the Crown; and the practice of appointing the nominee of the Crown is established. See St. 47 & 48 Vict. c. 71 (1884).

In many of the United States there are officials known as Public Administrators who by virtue of their office administer the estates of persons dying intestate and without kin, or are entitled to the grant of administration of such estates. 1 Woerner, Amer. Law Adm. (2d ed.) § 180.

A creditor, except by the practice of the court, has no right to administration. "I do not know, if circumstances showed that the creditor was not a proper person, that the court might not appoint another person." Per SIR HERBERT JENNER, in *Menzies v. Pulbrook*, 2 Curt. 845, 850 (1841); 1 Wms. Exec. (10th ed.) 349.

But in many of the United States there are statutory regulations preferring creditors, after the next of kin. 1 Woerner, Amer. Law Adm. (2d ed.) § 239.

If all the persons entitled to administration renounce, the court may grant letters to any person at its discretion. *Goods of Mayer*, L. R. 3 P. & D. 39 (1873).

The courts strongly incline to grant administration to the persons entitled to the

property. This inclination is so strong that the courts have sometimes yielded to it, even against the express words of the statute (*Young v. Peirce*, *ubi supra*; *Thomas v. Butler*, *ubi supra*), and have generally been governed by it in the exercise of their discretion.

A person entitled to administration may renounce, even after he has intermeddled with the goods of the intestate. *Goods of Fell*, 2 Sw. & Tr. 128 (1861). Cf. *Parten v. Busenden*, 1 Mod. 218 (1676), *ante*.

ADMINISTRATION CUM TESTAMENTO ANNEXO. If the deceased left a testament, but named no executors, or if the named executors are unable or unwilling to serve, letters of administration will be granted *cum testamento annexo*. In the absence of statutory regulations, the courts strongly incline to grant the administration to the residuary legatee, on the principle that the right of administration ought to follow the right of property. *Atkinson v. Barnard*, 2 Phillim. 816 (1815); *Goods of Oliphant*, 1 Sw. & Tr. 525 (1860); *Goods of Pryse*, L. R. [1904] P. 301; 1 Woerner, Amer. Law Adm. (2d ed.) § 245. Cf. *Taylor v. Diplock*, 2 Phillim. 261 (1815).

The statute of 21 Hen. VIII. c. 5, *supra*, made the same provisions as to the grant of administration in the case that the named executors refused to prove the testament as in the case that the deceased died intestate. In spite of the words of the statute, however, the courts have granted administration, *cum testamento annexo*, to the residuary legatee in preference to the next of kin. *Thomas v. Butler*, 1 Vent. 217 (1672).

ADMINISTRATION DE BONIS NON. If the sole or surviving administrator die or be discharged, not having fully administered the estate of the intestate, letters of administration *de bonis non* will be granted. The practice of the court with respect to determining the person or persons to be granted letters of administration *de bonis non* is the same as the practice with respect to letters of general administration. *Kinleside v. Cleaver*, 1 Hagg. Ecc. 345 (1745); 1 Woerner, Amer. Law Adm. (2d ed.) § 247.

ADMINISTRATION CUM TESTAMENTO ANNEXO DE BONIS NON. If the sole or surviving administrator *cum testamento annexo* die or be discharged, not having fully administered, letters of administration *cum testamento annexo de bonis non* will be granted.

If the sole or surviving executor die intestate, or be discharged, not having fully administered, similar letters will be granted.

If the sole or surviving executor die testate, similar letters will be granted in the United States; but in England, if there is an executor of the executor, he succeeds to the first executorship. See 4 Gray, Cas. on Prop. (2d ed.) chap. 5 § 2.

ADMINISTRATION PENDENTE LITE. Courts having jurisdiction to grant administration and probate have authority to appoint an administrator to serve during the continuance of any contested administration or testamentary suit. It was once doubted whether such appointment could be made pending a contested testamentary suit. But this doubt was removed by the decision of the King's Bench in *Walker v. Woollaston*, 2 P. Wms. 576 (1781).

The court usually has power to appoint as such administrator any person whom it deems fit.

The administrator *pendente lite* has power to preserve and get in the estate of the deceased. *Walker v. Woollaston*, *ubi supra*. And the tendency of statutory enactments has been to enlarge his powers and obligations. St. 20 & 21 Vict. c. 77 § 70 (1857); *Benson v. Wolf*, 43 N. J. L. 78 (1881).

ADMINISTRATION DURANTE MINORE ETATE. If the person whom the testator nominated as sole executor, or who has a statutory right to administration, is under age, an administrator will be appointed to serve during his minority. The selection of such administrator is within the discretion of the court. *Smith's Case*, 2 Stra. 692

(1731). The guardian of the minor is usually appointed. Such an administrator has all the powers, during the continuance of his office, of a general administrator *Re Cope*, L. R. 16 Ch. D. 49, 52 (1880).

OTHER LIMITED ADMINISTRATIONS. As to other temporary and limited administrations, see 1 Wms. Exec. (10th ed.) 403-419.

BONDS. ST. 22 & 23 CAR. II. (1671) c. 10, §§ 1-3. Be it enacted by the King's most excellent Majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the 1st day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.,

§ 2. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of the court, at or before the day of next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the day of . . . And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within-bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

§ 3. Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice. . . .

See *Archbishop of Canterbury v. Tappen*, 8 B. & C. 151 (1828); *Same v. Robertson*, 1 C. & M. 690 (1838); 1 Woerner, Amer. Law Adm. (2d ed.) §§ 249-260.

SECTION V.

EFFECT OF PROBATE.

NOELL v. WELLS.

KING'S BENCH. 1668.

[Reported 1 Lev. 235.]

DEBT by the plaintiff, as executrix to her husband: the defendant pleads *Never executrix*; and on a trial the plaintiff produced the probate of the will in evidence: the defendant said, that the will was not a true, but a forged will. And the *Chief Justice*, before whom it was tried, was of opinion, that he could not give such evidence directly contrary to the seal of the ordinary in a matter within his jurisdiction, whereupon a case was made for the opinion of the court, and a verdict taken for the plaintiff; but judgment to be stayed, if the court should be of opinion, that such evidence might be given; and upon motion the whole Court held, that it could not be given. But evidence may be given, that the seal was forged or repealed, or that there were *bona notabilia*; for those confess and avoid the seal. But he cannot give in evidence that another was executor; or that the testator was *non compos mentis*, for those falsify the proceedings of the ordinary in cases of which he is judge. But those are to be remedied by appeal.¹

NOTE. — At common law probate had no effect on title to freehold land. When copyhold land was surrendered to the use of the tenant's will, it would seem that probate was no evidence of the existence of a will, as the judgments of the ecclesiastical courts bound only those who claimed an interest in the personality. See 1 Wms. Exec. (10th ed.) 439, and case cited.

PLUME v. BEALE.

CHANCERY. 1717.

[Reported 1 P. Wms. 388.]

A BILL was brought by the executor of Doctor Plume, to be relieved against a legacy of £100, claimed by the defendant Beale, as given by the will of Doctor Plume.

The defendant Beale was no relation to the doctor, nor had done him any service, saving that now and then she had, during his illness, brought him some few slight cordials, in return for which, the doctor had ordered her a piece of plate.

¹ Cf. *Hoes v. N. Y., N. H. & H. R. R. Co.*, 178 N. Y. 435 (1903).

This £100 legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left.

But forasmuch as the will was proved by the plaintiff the executor in a proper court, that had a proper jurisdiction, (it relating only to a personal estate,) and more especially, for that the executor might have proved the will in the spiritual court, with a particular reservation as to this legacy, the COURT [LORD COWPER, C.] said, his remedy must be there, and dismissed the bill with costs.¹

SECTION VI.

REVOCATION OF PROBATE AND ADMINISTRATION.

BAXTER AND BALE'S CASE.

COMMON PLEAS. 1587.

[Reported 1 Leon. 90.]

BAXTER brought debt upon a bond as executor of I. against Bale; who pleaded that the plaintiff after the death of the testator was cited to appear before the ordinary or his commissary to prove the will of the said I., and at the day of his appearance he made default, upon which the ordinary committed letters of administration to the defendant, by force of which he did administer, so the debt is extinct, &c., but the whole COURT was clear of opinion, that the debt was not extinct, for now by the probate of the will the administration is defeated, and although the executor made default at the day which he had by the citation before the ordinary, yet thereby he is not absolutely debarred, but that he may resort to the proving of the will whensoever he pleaseth; but if he had appeared and renounced the executorship it had been otherwise; and the debt is not extinct by the administration in the mean time.²

¹ See *Allen v. M'Pherson*, 1 H. L. C. 191 (1847); *Meluish v. Milton*, L. R. 3 Ch. Div. 27 (1876); *Case of Broderick's Will*, 21 Wall. 603 (U. S. 1874).

On the right of the court of construction to look at the original will, see 1 Wms. Exec. (10th ed.) 445-448.

In most of the United States, probate is conclusive as to realty as well as to personalty. In New York and some other States, however, it is conclusive as to personalty, but only *prima facie* evidence as to realty. 1 Woerner, Amer. Law Adm. (2d ed.) § 228.

² In *Graysbrook v. Fox*, Plowd. 275 (C. B. 1565), the plaintiff, executor of the will of Kene, brought detinue for sundry chattels against the defendant. The defendant pleaded that Kene died possessed of the said chattels; that administration of his goods was granted to his son; and that before the probate of Kene's

PACKMAN'S CASE.

QUEEN'S BENCH. 1595.

[Reported 6 Co. 18 b.]

WILSON brought an action on the case on trover against Packman, and the case was such; a man died intestate, and the ordinary committed administration to a stranger, and afterwards the next of kin of the intestate sued a citation in the spiritual court, to have it repealed; pending which suit, the administrator, to defeat the plaintiff in the spiritual court of the effect of his suit, sold the goods of the intestate to the defendant: and afterwards the letters of administration are revoked by sentence, and the first sentence annulled and made void,

will, the son sold the said chattels to the defendant. The plaintiff demurred. DYER, C. J., and WALSH, J. (WESTON, J., *dissentiente*), sustained the demurrer.

WALSH, J., said: "That the seal of the ordinary put to the administration is but a matter of fact, which is not any estoppel for the time, nor shall it force the executor to sue in the spiritual court to repeal it, but he shall avoid it by plea, or by taking the goods from the administrator, or by some other matter of fact as occasion shall offer. And to prove this he cited the first case in Trin. 44 Ed. 3, where one brought a writ of debt against another as administrator, and declared that the debtor died intestate, and that the ordinary deputed the defendant to be administrator, and he showed the same in certainty, and the opinion of the court there was, that he ought to do so; and the defendant said, that the deceased made his testament, and constituted the defendant and another his executors, and he demanded judgment of the writ, and showed forth the testament proving his plea, and the plaintiff offered to aver that the party died intestate, and the defendant said that he should not be received to this averment against the testament which is proved before the ordinary, and is under the seal of the ordinary, *sed non allocatur*; wherefore the plaintiff had the averment, and it was tried *per pais*. So that the seal of the ordinary to the probate of the testament could not deprive the plaintiff of his averment, but that he should have it, and try it *per pais*."

The same judge also said: "If the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeasible; and the reason is, because by the commission of the administration to him by the ordinary, who was ignorant of the testament, he has a color of authority, though it is not a rightful one, and he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellable to do, and the administrator having done that which the executor himself was obliged to do, his act shall be allowed good, because the executor himself is thereby freed and excused from the trouble of doing it. And so inasmuch as the administrator was compellable to do it, (for if he was sued for a thing which ought to be done, he could not disable or discharge himself for the time,) it is reasonable, and no detriment to any one, that the thing done should remain stable and firm without impeachment. And hereupon he cited the case of *Sands and Peckham*, in 4 H. 7, where Peckham, claiming to be executor to one who was dead by a false testament supposed to be made by the testator, had got this false testament to be allowed, upon default of Sands, who claimed to be executor by a latter will, before a certain person appointed by a delegacy, and the will exhibited by Peckham was proved,

and afterwards administration was committed to the plaintiff. And it was resolved that the action did not lie; and thereupon the plaintiff discontinued his action: and in this case a difference was taken between this suit by citation, which is to countermand or revoke the former letters of administration, and an appeal, which always is to reverse a former sentence, for the appeal doth suspend the former sentence; otherwise of a citation: and in this case forasmuch as the first administrator had the absolute property of the goods in him, without question he might give them to whom he pleased. And although the letters of administration be afterwards countermanded, and revoked, yet that cannot defeat the gift. But if the gift be by covin, it shall be void by the Statute of 13 Eliz. against a creditor, but it remains good against the second administrator; and if an administrator waste the goods, and afterwards administration is committed to another, yet any debtee shall charge him in debt; and if he pleads the last administration

and afterwards Sands sued out another delegacy to another, who awarded that the testament exhibited by Sands was true, and that he was executor, and that the said testament whereby Peckham claimed should be void, and upon this Sands sued an action of debt against Peckham for 40 marks, which he was bound to the testator to pay, and Peckham showed the allowance of his testament *ut supra*, and that during the time that his testament was in force he paid the 40 marks to one of whom the testator had received so much for usury; and it was adjudged no plea, because he was not bound by law to repay the usury, for it is but a thing of conscience, which the law will not compel him to pay. But there it is held, that although he was not executor of right but of wrong, yet if he had paid any debt due by specialty, or other thing, which the law will force the executor to pay, the true executor should have been bound by it, and should have been obliged to allow it, because the other was compellable to pay it, and the true executor had no prejudice by it, forasmuch as he himself should have been bound to pay it. And it is there put, that if the bailiff of a manor pays the debts of his master due by specialty or contract, he shall not be allowed for it in his account, because he was not compellable to pay them; but if he pays quit-rents issuing out of the manor, he shall be allowed for it in his account, because it belongs to his office to pay them. And so here if the administrator had aliened the goods specified in the count to pay the funeral or debts, the sale had been good and indefeasible; *quod alii duo Justiciarii concesserunt*. And upon this Dyer cited the case in 12 H. 7, where the Dean and Chapter of Paul's brought an action of trespass against one for cutting down great trees, and the defendant justified as their bailiff of a manor, in which there was a park enclosed with pale from time beyond the memory of man, and that he cut down the trees for the necessary enclosure of the park with pale, and applied them to that use; and the opinion of the court was that he might justify, for it belongs to his office to repair or maintain the park or edifices of the manor in the same condition as they have always been, but he cannot make a new pale, or new houses, or anything in other manner than they have used to be, but to maintain and keep them in the same form is a part of his office, and he shall be allowed for the same. So in the principal case, if the defendant had shown that the sale was made to him by the administrator in discharge of anything which he had been compellable to do, the sale should not have been avoided; but he has not shown any such matter, nor has he taken any such averment, and therefore it cannot be taken by the plea that it was applied to any such purpose, for which cause the plea in bar is not good, and the plaintiff ought to recover. And (as I heard) ANTHONY BROWN, J., afterwards declared to them that he was of the same opinion, wherefore judgment was given for the plaintiff the same term."

See *Abram v. Cunningham*, 2 Lev. 182 (1677).

committed to another, the other may reply, that before the second administration committed, he had wasted the goods. *Vide* 17 Eliz. Dy. 339, the like case, and 34 H. 6. 14 a, b. Administration may be granted on condition, and it was holden in such case, if such administrator, before the condition broke, gives away the intestate's goods, and afterwards the condition is broke, yet the gift stands good. And observe, reader, a manifest difference between this case and the case of 17 Eliz. For in our case the administration granted was lawful, and the gift also lawful, and the donee claimed in under the first administration, which the second administrator did intend to countermand and revoke; but in the case of 17 Eliz. the second administrator (who obtained the second administration by covin had with the defendant in the action without any recital of the first administration) did release to the defendant by covin to bar the plaintiff of his execution: it is there adjudged, that the said second letters of administration being by sentence reversed, and declared to be void, the defendant who was party to the covin being in execution should not have an *audita querela*. But that is not to be likened to our case, for there the defendant claimed by the second administration, which is declared to be void, and the first always in force, so that the second administration was never lawful; but in our case the first administration was lawful, until it was countermanded, and so a difference.¹

SEMINE v. SEMINE.

KING'S BENCH. 1673.

[Reported 2 Lev. 90.]

ADMINISTRATION was granted, and the administrator by virtue thereof being possessed of a term, made a lease of the land, and after was a citation to repeal the administration, but it was affirmed; upon which sentence of affirmation an appeal was sued, and the sentence of affirmation thereby repealed, and the first administration repealed, and administration granted to another. And by HALE and the whole court, this new administrator shall not avoid the lease of the first administrator for this is only a repeal of the sentence in the citation, and so is in the nature of a suit on the citation; and so it is all one as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had originally been brought upon the first administration, which thereby had been totally annulled. 6 Co., *Packman's Case*.²

¹ See *Blackborough v. Davis*, 1 Salk. 38 (1701).

² See *Hughes v. Burriess*, 85 Mo. 660 (1885).

ALLEN v. DUNDAS.

KING'S BENCH. 1789.

[Reported 3 T. R. 125.]

THIS was an action on the case for money had and received to the use of the intestate, and to the use of the plaintiff as administrator: to which the defendant pleaded the general issue. And on the trial a special verdict was found, stating in substance as follows. The defendant, as treasurer of the navy, was indebted to the intestate in his lifetime in £58 13s. 6d. for money had and received to his use. Priestman died on the 2d of June 1784: on the 13th of August 1785, one Robert Brown proved in the Prerogative Court of the Archbishop of Canterbury, a forged paper writing, dated the 18th of May 1784, purporting to be the last will of Priestman, otherwise Handy; whereby he was supposed to have appointed Brown the sole executor thereof; and a probate of that supposed will issued in due form of law, under the seal of that court, on the same day, in favor of Brown. The defendant, not knowing the will to have been forged, and believing Brown to be the rightful executor, on Brown's request paid him £58 13s. 6d., being the whole balance then due from the defendant to Priestman. On the 21st of July 1787, Brown was called by citation, at the suit of John Priestman the father, and next of kin of the deceased, in the Prerogative Court of the Archbishop of Canterbury, touching the validity of such supposed will; and such proceedings were thereupon had in that court, that the will and probate were declared null and void; that Thomas Priestman died intestate; and that John Priestman the father was his next of kin. And on the 31st of March 1788, letters of administration of the goods, &c. of Thomas Priestman were granted by that court in due form of law to the plaintiff, as attorney of John Priestman. But whether, &c.

Shepherd, for the plaintiff.

Baldwin, for the defendant.

ASHHURST, J. I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who had at that time a legal authority to receive it. It is admitted, that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it: but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it: this therefore cannot be called a voluntary payment. This is different from payments under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and acts at his peril: a payment in such a case

is a voluntary act, though perhaps the party is not guilty of any negligence in point of fact. But here the defendant acted under the authority of a court of law; every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject matter; and every person was bound to give credit to the probate till it was vacated. The case of a probate of a supposed will during the life of the party may be distinguished from the present; because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction. Besides, the distinction taken by the defendant's counsel between cases where a will is set aside on an appeal, or on a citation, seems to have some foundation: in the former the original sentence is as if it had never existed; in the latter, the will is only repealed, and all acts under it till the repeal are good. But the foundation of my opinion is, that every person is bound by the judicial acts of a court having competent authority: and during the existence of such judicial act, the law will protect every person obeying it.

BULLER, J. The first question to be considered is, What is the effect of a probate? It has been contended by the plaintiff's counsel, first, that it is not a judicial act; and 2dly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the ecclesiastical court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good. And the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed: and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: but where they have no jurisdiction, their whole proceedings are a nullity. As to the case in Com. 150, I think it carries its own death-wound on the face of it. It is an anonymous case, and is said to have been determined on the 5th of Ann. In the replication in that case, there is a traverse that the testator made such will by which A. B. was appointed executor. It is rightly admitted that such a traverse cannot be supported. The courts of common law cannot try whether it be a good will or not, for that depends on ecclesiastical law. The Chief Justice, in giving the judgment of the court, begins with giving as his reasons, "that an executor derives all his authority from the testator himself; and that he of himself, as being executor, without anything more, has the power of disposing of the testator's estate. True it is, before an action brought a probate is necessary, but that is only requisite to ascertain the court that the plaintiff is executor." From this admission it

appears that there are no means of ascertaining who is executor but by applying to the ecclesiastical court for a probate: so that the reason destroys itself. Then he proceeds to point out the difference between a citation and an appeal. Now if that distinction extend to the case of executors as well as administrators, it will decide the present case. But he goes on to add in that case, "but it is otherwise in the case of an executor; for the probate of the will gives no authority at all to him." In that I differ from him; because an executor has an authority which a court of common law cannot dispute. The Chief Justice afterwards goes on to say, "that that case was not like the case of an officer who officiated without legal authority, as the deputy of the deputy of a steward, &c.; for rightful acts done by him are good, for he is an officer *de facto*, and in the immediate and open execution of his office. And the parties did not know whether he had authority or not." That is just the present case; for here there was an executor *de facto*, who had obtained a probate; and the defendant neither knew or could tell whether he was rightful executor or not, further than he was informed by the probate, which he could not dispute. Then the Chief Justice resorts to the argument of inconvenience, if a tortious executor should be permitted to dispose of the right and interest of a rightful executor. But I think that the inconvenience is clearly the other way; because, if there be a rightful executor, and he does not come forward, he is guilty of *laches*. Suppose such an one were to lay by for a number of years, and in the meantime all the debts were to be collected by another person who had obtained a probate as executor: those payments ought to be protected; for during all that time the debtors could not controvert his authority; and it is admitted that if actions had been brought in such cases, the debtors could not have made any defence. Another thing to be observed in the case in Comyns is, that it was decided on the authority of a case in Ro. Abr. 919, which is there said was never denied. From that circumstance I am inclined to think it passed without much consideration; for the doctrine in Ro. Abr. is contradicted in 2 Lev. 90, and 1 Lev. 158 and 236. In the last of those cases, the objection was first made at *Nisi Prius*: but the point was reserved for the opinion of the court on a case (which shows that the practice of granting cases is not of very modern date, for that was in Charles the Second's time); and it was there resolved by the court that, on the plea of *ne unques* executor, evidence might be given that the seal of the ordinary was forged, or that there were *bona notabilia*; for they confess and avoid the seal. But they also held that evidence, that another, and not the plaintiff, was executor, or that the testator was *non compos mentis*, or that the will was forged, could not be admitted; for that would be to falsify the proceedings of the ordinary in cases of which he is judge. It seems therefore strange that the Chief Justice should have said in that case that the case in Ro. Abr. had never been doubted; because these cases determined the reverse of the doctrine there contained. Then as to the traverse in the case in Comyns, it is

impossible to support it. The Chief Justice says that "the traverse is good; for whether a will or no will is a question triable by a jury; and the reason is, because the spiritual court had not the original jurisdiction of the probate of wills, and because as to trial the temporal courts have *quasi* a concurrent jurisdiction." Now this reason undoubtedly fails. The concluding reason there given is, "that the probate of a will concludes a person from saying there was no such will; but notwithstanding this matter may be brought to trial; for the producing a will under probate is only evidence that there was such a will. And though it is evidence of so strong a nature that no evidence shall be admitted against it, yet to plead that such a will was proved is no reason why this matter should not be tried." This reason is directly contradictory to itself; for, first, he says that the probate is only evidence of the will, and that it may be tried; and yet he adds, that it is conclusive, and that no evidence can be admitted against it. Therefore I think this case is destructive of itself. Another head of argument by the plaintiff's counsel was, that the payment in this case under the probate was not a compulsory one, and a case of bankruptcy was alluded to. But a determination on the bankrupt laws cannot govern the court in deciding this question. Those cases turn on a fraudulent preference given to one creditor over another: but even there the courts have never proceeded on the idea that a judgment is necessary to enforce payment; a threat is sufficient. And the question in those cases is, whether the payment under the circumstances be fair, or with a view to defraud the rest of the creditors.

GROSE, J. No doubt could ever have been entertained on this subject, had it not been for the case in Ro. Abr. and Comyns; which struck me at first as being very strong cases to the point for which they were cited: but I am satisfied, by what has been said by my Brother Buller, that they cannot be law. The case in Comyns seems to be grounded on a false principle, namely, that the probate of a will gives no authority to the executor. But I think it does, and so much so that it cannot be traversed or denied. Gilb. Eq. Cas. 207, 8. Then the payment to the executor in this case was made under the judicial act of a court having competent jurisdiction on the subject, which could not be disputed. And therefore it is not like a payment under a forged bill of exchange or bond, for this was made under the authority of the probate, and not of the will. It has been said that there is a difference between a repeal of letters testamentary on appeal or on citation: however that may be, the ground of my opinion is that the law, which is founded on wise and sound principles, will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a court having competent jurisdiction.

*Judgment for the defendant.*¹

¹ See *Thompson v. Samson*, 64 Cal. 330 (1883).

WOOLLEY v. CLARK.

KING'S BENCH. 1822.

[Reported 5 B. & Ald. 744.]

TROVER for stock in trade and household goods. In the first count the goods were laid to be the property of the testator; in the second, of the plaintiff, as executrix. Plea, *Not guilty*. At the trial, before Abbott, C. J., at the Middlesex sittings after last Michaelmas Term, the following facts appeared in evidence: the testator died on the 16th June, 1819; at that time the defendant, Clark, had in his possession a will of the testator, bearing date the 29th April in that year, by which he was appointed executor. This will was proved on the 23d June, 1819, and administration was granted to Clark, and he directed the sale of the several articles mentioned in the declaration, which were sold by the other defendant, an auctioneer, on the 30th July, 1819. The testator had made another will on the 12th June, 1819, by which he appointed the plaintiff his executrix; and it was proved that the defendants had notice of this second will previously to the sale of the goods. The second will was proved on the 21st May, 1821 (the probate of the first will, under which the defendants acted, having been revoked upon citation), and administration was granted to the plaintiff. It was contended, on the part of the defendant, that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendants might show due administration of the assets to the amount of the value of the goods. The Lord Chief Justice would not allow the defendants to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule *nisi* having been obtained for a new trial,

Brougham and Chitty now showed cause.

The Solicitor-General, and *Wightman*, contra.

ABBOTT, C. J. There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. That being so, the property vested in the plaintiff, as executrix, from the time of the death of the testator; and, consequently, the defendants, who had notice of the second will, had no right to sell, and therefore are liable in this action.

BAYLEY and HOLROYD, JJ., concurred.

BEST, J. Where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under

it; but the sheriff is justified. Here, the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected.

Rule discharged.

KITTREDGE v. FOLSOM.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1835.

[Reported 8 N. H. 98.]

PARKER, J.¹ Upon the fourth plea, with the replication and rejoinder thereto, several questions have arisen. The plea alleges that the original administration, as executor of the will of Benjamin Kittredge, was granted to the defendant, 15th of February, 1832, and not before, and that the suit of the plaintiff was commenced before the expiration of one year from that time. To this, the plaintiff replies, that the defendant was appointed, by the judge of probate, administrator of said estate, March 17, 1830, and took upon himself that trust — that said appointment was the first and original grant of administration, and that the suit was not commenced before the expiration of one year from said 17th of March, 1830. The rejoinder admits these facts, but sets forth that this was a grant of administration as upon an intestate estate; that afterwards, an instrument purporting to be the last will of said Benjamin Kittredge, and purporting a disposition of his whole estate, was presented May 6, 1830, for probate, before the judge of probate; that the same was fully proved and approved in the Supreme Court of Probate, at January Term, 1832; that the plaintiff was named executor in said will, and on his refusal, the defendant, — and that on the plaintiff's refusal, administration under the will, with letters testamentary on said estate as a testate estate, was granted to the defendant, which administration is the same as that set forth in his fourth plea.

The first question raised by the demurrer is upon the sufficiency of this rejoinder. The Statute, as we have seen, provides that no action, for a cause of action against the deceased, shall be sustained against an executor or administrator, if commenced within one year after the original grant of administration. This suit was commenced June 2, 1832. If, therefore, the administration under the will granted to the defendant on the 15th of February, 1832, is to be regarded as the original grant of administration in this case, the action was in fact commenced before the period when it could rightfully have been instituted; but if the administration taken by the defendant March 17, 1830, may be regarded as an original administration, the rejoinder is insufficient.

¹ Part of the opinion only is here given.

That the latter was the first actual administration is apparent; and unless that administration was entirely void, by reason of the existence of the will which has since been proved, there seems to be no objection to holding it an original administration for the purpose of this suit.

The Statute requires the exhibition of the demand to the executor or administrator against whom the suit is commenced, before its institution; but the limitation of the term of one year in which it may not be commenced does not date from the appointment of the administrator against whom the suit is instituted, but from the time of the original grant of administration, to whomsoever it may be made. It can be of no consequence, therefore, that the defendant has received an authority to administer the estate as executor, under the will, within a year prior to the time when the suit was instituted, if his appointment as administrator, prior to that time, was of such validity that it can be regarded as an original grant of administration upon the estate.

It is admitted that the question is, whether the administration granted to the defendant, as upon an intestate estate, was or was not a nullity; and it is contended that it was wholly void, and authorities are cited to show that all acts done under it are entirely void, and of no effect.

The law is laid down in 1 Williams on Executors, 367, that if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; and for this the case of *Abram v. Cunningham*, reported 2 Lev. 182, T. Jones, 72, and in several other books, is cited.

But in the next page of the same writer it is said, "It should seem, however, that as between the rightful representative, and the person to whom the executor or administrator under a void probate or grant of letters has aliened the effects of the deceased, the act of alienation, *if done in due course of administration*, shall not be void. Thus in the case of *Graysbrook v. Fox*, above mentioned, it was laid down by the court that if the sale had been made to discharge funeral expenses, or debts which the executor or administrator was compellable to pay, the sale would have been indefensible forever." 1 Williams, 368: and so is the case, *vide* 1 Plowd. 282.

Now, how anything can be done in due course of administration, where the administration and everything done under it is merely and wholly void, it is difficult to discover. The due course of that which had no rightful existence, but was a mere nullity, would seem to be the due course of wrong, or nonentity, and presents a solecism somewhat worse than two original grants of administration on the same estate. The position, also, that a purchaser can obtain an indefeasible title from the void act of one whose supposed authority is a mere nullity, seems to have more of legerdemain than of law in it.

Again — It is said in the same author, "It must be observed that whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bona fide* payment

to the executor or administrator, of a debt due to the estate, will be a legal discharge to the debtor." 1 Williams, 370. That is to say, that the payment of a debt to him who has no authority to receive it, and whose act in receiving it is a void act, is a good discharge to him who owed the debt.

In *Allen v. Dundas*, 3 D. & E. 125, the court held that payment to an executor who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards avoided in the ecclesiastical court; on the principle that the debtor could not have controverted the title of the executor so long as the probate was unrepealed, and might well pay when he could make no defence. See also 8 East, 189; Bac. Abr., Executors, &c., E. 13.

So where administration is granted, and afterwards there appears to be an executor, if the administrator has paid debts, legacies, or funeral expenses, he may retain, because he was compelled to pay; and the true executor has no prejudice, for he would have been bound to pay them. And in *Graysbrook v. Fox*, Weston, Justice, was of opinion that the sale of the goods by the administrator was indefeasible, although it was not shown that they were sold to discharge debts or funeral expenses. 1 Plowd. 279.

There is evidently an inaccuracy in the use of the term *void*, in many instances in the books, upon this and other subjects; and the attempt to reconcile all the authorities upon the matter now under consideration must be in vain. An administration granted by the competent authority, upon a proper case made, can with no propriety be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. 6 Co. 19, *Packman's Case*; 2 Lev. 90, *Semine v. Semine*. The acts of such administrator must be quite as valid as those of an executor under a will which has been revoked by the testator. The grant of administration confers an existing authority, which cannot be resisted or disregarded until the will appears. 1 Lev. 235, *Noell v. Wells*. The administrator in such case comes into his office by color of an authority. Plowd. 282. He is administrator *de facto*, and his acts, done in due course of administration, must be valid, at least so far as third persons are concerned. 7 N. H. R. 131. A distribution to those not entitled may perhaps form an exception. The circumstance that an executor is said to derive his authority from the testator, cannot affect the principle; for until it appears that the deceased has exercised the power, and made an appointment, the judge of probate has the right, and is bound to grant administration. The attempt, therefore, to draw a distinction between a grant of administration in derogation of the right of the executor, and one in derogation of the right of the next of kin, holding the former void, and the latter only voidable, is not well sustained. The judge of probate has jurisdiction to allow a will, if one is presented, and if not, to grant administration. He may well grant the latter when there is no evidence that the former has any existence, and his act in

doing so is not to be held entirely void, because in derogation of the right of an executor, who has perhaps occasioned the act by his own neglect.

It is said that there are many things which an executor may do before probate. 1 Bac. Abr., Executors, &c., E. 14; 3 N. H. R. 517, *Strong v. Perkins*. But where an administration has been granted, an individual, by virtue of being named executor in a paper purporting to be a will, cannot control the acts of such administrator except by a probate of the will. In no other way can it appear that the administration is not well granted; for the will may be entirely ineffectual by reason of a want of sanity in the testator, or because it was procured by fraud, or has been revoked, &c.

And it may well deserve consideration, whether under our Statute of July 2, 1822 (which provides that no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge of probate), an individual named executor can do any act as such until after the probate of the will.¹ The bonds are to be given to the judge upon the probate of the instrument.

The defendant in this case, under his first appointment as administrator might have commenced a suit upon a demand due to the estate, and have prosecuted it to judgment if the time had permitted, and no defence could have been made to it. The production of a will without probate would have been of no avail. 16 Mass. R. 442, *Dublin v. Chadbourne*; 1 Pick. 547, *Laughton v. Atkins*; 1 Pick. 114, *Shumway v. Holbrook*; 4 D. & E. 260, *The King v. Netherseal*.

So a suit might have been commenced against the defendant as administrator, on the lapse of a year; and to such suit the existence of a will without probate, or a plea that he was not rightful administrator, would have been no bar.

Payment, then, made to him, *bona fide*, must operate as a discharge of the debtor; and payment by him of a debt which the deceased owed, would be a valid act, for which he might retain, if the estate was solvent.

How far notice of a will might have afterwards affected his liability to a third person who was rightful executor, it is not necessary now to consider. 5 B. & Ald. 744, *Woolley v. Clark*.

Had this suit been commenced against him as administrator after the lapse of a year without the production of the will, he must have plead to the merits. Perhaps had the will in such case been proved before trial, and a third person been executor, he might have plead the matter in bar of the further maintenance of the suit.

But we see no sound principle upon which he could have done this, had he himself, being the executor, taken letters testamentary during the pendency of the suit. There would in such case be no sufficient reason why the suit, which had been well commenced, should be defeated, in order that another should be instituted against him for the

¹ See, accord, *In re Will of Somervuill*, 104 Wis. 72 (1899).

same cause, describing him as executor instead of administrator. 5 N. H. R. 342, *Giles v. Churchill*. He might have paid as administrator, and been protected. He might continue the defence, if he thought proper, under his character as executor.

So we think a suit commenced by him as administrator before probate, could not have been defeated by a plea that since the last continuance he had proved the will, and been accredited as executor instead of administrator. It would be a mere change of his title of office, so far as the prosecution of such suit was concerned. It would be otherwise in case a third person had been appointed executor.

We have not, therefore, laid out of consideration the circumstance that the same individual who took the administration is the rightful executor, because his acts might in our opinion be continued; and no doubt all he had done under the administration, not in conflict with the provisions of the will, may be carried into the account of his administration, and allowed in the probate court, as if he had acted as executor in the first instance.

Upon the facts in this case, then, we hold that the grant of the administration on the 17th of March, 1830, was the original grant of administration within the terms of the Statute. Whether we must have arrived at a different conclusion had that grant been to a third person, and the suit commenced against the defendant before the expiration of a year from the probate of the will, we do not determine. The fact that the acts of such administrator, not in derogation of the provisions of the will, must be held valid as far as third persons were concerned, would certainly tend to give such an administration the character of an original administration within the meaning of the Act. The circumstance, however, that the executor might not have had knowledge of the condition of the estate, or have been able to collect the assets so as to make payment, must be weighed in such case, and upon this we give no opinion.

Porter, Bell, and Pillsbury, for the plaintiff.

C. H. Atherton, Bartlett, and Betton, for the defendant.

NOTE. — In *Waters v. Stickney*, 12 All. 1 (Mass. 1866), the Probate Court in 1851 approved a will. In 1865, a petition was presented to the court alleging that there was also a codicil, proof of which had been inadvertently omitted. The court decreed that the will already proved and the codicil should be approved and allowed as the last will of the deceased. The decree was affirmed on appeal. But cf. *Besançon v. Brownson*, 39 Mich. 888 (1878).

CHAPTER VI.

ESTATE AND POWERS OF AN EXECUTOR OR ADMINISTRATOR.

SECTION I.

TIME WHEN THE ESTATE VESTS.

MIDDLETON'S CASE.

COMMON PLEAS. 1603.

[Reported 5 Co. 28 b.]

It was adjudged in the Common Pleas between Middleton and Rimot, that an executor before probate might release an action, although before probate he could not have an action, for the right of the action is in him; but if A. releases and afterwards takes administration, it should not bar him, for the right of the action was not in him at the time of the release. *Vide* 18 H. 6, 43 b. *Griesbrook's Case*, Plow. Com. 277, 278; 21 E. 4, 24 a. Two executors prove the will, the third refuses, yet he may release. Lit. 177. If a man be bound to pay a sum at a day to come, a release of all actions before the day bars it, yet before the day he cannot have an action of debt; and so the opinion of SIR THOMAS GAWDY in the case before was now adjudged.¹

¹ "For St. Paul says, 'a testament is confirmed by death,' so that by his definition, and by our law also, it is a testament when the testator is dead, and the executors named are executors presently and before the probate of the testament, for the probate is but a confirmation and allowance of that which the testator has done. For the spiritual court men have divers terms, as *insinuation*, which is a surmise that there is such a testament, and *approbation*, which implies that the surmise is tried to be true, and allowed, and in witness thereof the ordinary puts his seal. But before this is done it is a testament, and the executors named are executors, for the death preceding makes it a testament, and by the death the property of the goods which was in the testator, is cast upon and vested in the executors. And they are not called executors in respect only that they actually execute, but in respect that they may execute. And they may execute before probate, and may be sued, although they shall not sue for any duty due to the testator until they have proved the testament, and they may alien or give away the goods, or otherwise dispose of them before probate." — *Per* DYER, C. J., in *Graysbrook v. Fox*, Plowd. 275, 280 (1565). Cf. *Wankford v. Wankford*, 1 Salk. 299, 301.

An executor may demise leaseholds before probate. *Roe v. Sumnerset*, 2 W. Bl. 692 (1770).

In *Doe d. Hornby v. Glenn*, 1 A. & E. 49 (1834), it was held, that an administrator was not bound by an agreement that he had made as to the estate before taking out letters. LORD DENMAN, C. J., said: "It would be very strong to hold that the lessor of the plaintiff was bound, after he became rightful administrator, by an act of this kind done by him while he was an executor *de son tort*."

LOCKSMITH v. CRESWEL.

KING'S BENCH. 1634.

[Reported 2 Roll. Ab. 399.]

IF a man dies possessed of certain goods, and then a stranger takes and converts them to his own use, and then administration is granted to J. S., this administration will relate to the death of the testator, so that J. S. can maintain an action of trover and conversion for this conversion before the administration granted to him. Adjudged Tr. 10 Car. B. R., between *Locksmith* and *Creswel*, this being moved in arrest of judgment after verdict for the plaintiff.¹

ANONYMOUS.

KING'S BENCH. 1640.

[Reported 1 Roll. Ab. 917.]

IF an executor before probate of the will brings an action of debt on an obligation due to him as executor, but when he declares he shows it to the court approved, it being approved after action brought, yet the action is well brought, because he was executor before probate, although by the law he is not permitted to sue before probate, yet it being proved, the impediment is removed *ab initio*, for he, by showing the will to the court, satisfies the ceremony which the law requires,

¹ So in *Tharpe v. Stallwood*, 5 M. & G. 760 (1843), it was held, after an elaborate discussion, that an administrator might maintain *trespass* for acts done after the death of the intestate, and before the grant of administration. And see 1 Wms. Exec. (10th ed.) 659.

But in *Crossfield v. Such*, 8 Exch. 825 (1853), it was held that an administrator could not maintain *detinue* against one who had had possession of his intestate's goods, but had ceased to hold them before the grant of administration.

"As to trespasses with respect to personal chattels, the law undoubtedly establishes a relation for the purposes of justice. Though the title of the administrator to personal chattels accrues only by the grant of administration, it is quite settled that there is a relation to the death of the intestate so as to recover for mesne injuries to them, or for their conversion; otherwise there would be no remedy for the wrong done, and the relation is allowed for that reason: Com. Dig. 'Administration' (B. 10); and, by parity of reasoning, the law ought to give a relation to enable the administrator to recover for mesne injuries to leasehold property; and Lord Ellenborough, in *Rex v. The Inhabitants of Horsley*, 8 East, 410, seems to have been of opinion that such relation existed. Whether, in order to bring an action of trespass, he should make an actual entry, his Lordship does not state." — *Per PARKER, B.*, in *Barnett v. Guildford*, 11 Exch. 19, 31 (1855).

But the reversion of a term "is in the executor immediately by the death of the testator," *Pratt v. King*, T. Jones, 169 (1681).

which he has done here as the law requires. *Held* by BERKELEY [J.] on a writ of error on such a judgment in the Court of The Marshalsea, where it was so adjudged on a special verdict.¹

WHITEHALL v. SQUIRE.

KING'S BENCH. 1690.

[*Reported* 1 *Salk.* 295.]

In an action of trover by the plaintiff as administrator of J. M. for a gelding, on not guilty pleaded, the jury found a special verdict, viz. that J. M. was possessed of the gelding, and put him to the defendant to pasture, and died intestate: that, before administration granted, the plaintiff desired the defendant to bury J. M. decently, who accordingly buried him, and laid out £23 therein; whereupon the plaintiff agreed, that the defendant should have the horse in part of satisfaction of funeral charges, and for £13 residue thereof gave him his note; afterwards the plaintiff took out administration, and now brought trover for the horse; and HOLT, C. J., was of opinion, that the action well lay; for that the defendant was a tort executor, and the plaintiff's consent, when he had nothing to do, would not alter the case; for if he had then released, yet he might have taken administration, and brought an action afterwards; but DOLBEN and EYRE, Justices, *contra*, and the defendant had judgment.²

¹ "But though he [the executor] may commence an action before probate, yet he cannot indeed go on with the action; for when he comes to declare, he must produce in court the letters testamentary; but now if probate were necessary to make him an executor, he could not bring the action without probate, as is evident in the case of an administrator, in which case there is no right till administration committed; for till then the administrator cannot bring an action; but in the case of an executor, the not proving the will is only an impediment to the action; but the right of action is the same before probate as after; and the reason why an executor cannot go on before probate is for the enforcing of probates, as is said in Hutton, 21, because upon probates there are inventories exhibited and other acts done by the executor, which are for the benefit of the creditors of the testator." — *Per* POWELL, J., in *Wankford v. Wankford*, 1 *Salk.* 299, 303 (1703).

In *Patten v. Patten*, Alc. & N. 493 (1833), it was *held* that on ejectment by an administrator the fictitious demise might be laid before the grant of letters.

In equity a bill by an executor which does not allege probate is demurrable, *Humphreys v. Ingledon*, 1 P. Wms. 752 (1721). "An executor may at law bring an action before probate, but cannot declare till the will is actually proved, and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate." — *Per* LORD HARDWICKE, C., in *Mitchell v. Smart*, 3 Atk. 606 (1748).

But if a bill, not only by an executor but by an administrator, alleges probate or grant of letters so as to be saved from demurrer, it is enough if the will is in fact proved, or the letters of administration granted at the time of the hearing; *Humphreys v. Humphreys*, 3 P. Wms. 349 (1735); *Fell v. Lutwidge*, Barnard. Ch. 319, 320 (1740); *Horner v. Horner*, 23 L. J. Ch. 10 (1853); 1 Dan. Ch. Pract. (6th ed.) 404, 405.

² See *Mountford v. Gibson*, 4 East, 441, 445 (1804), *ante*.

WARING v. DUBERRY.

KING'S BENCH. 1718.

[*Reported Fortescue*, 360.]

Goods were taken in execution and the money levied, then administration is taken to the landlord, who died intestate, and the administrator moved the court to have a year's rent.

PER CUR. He comes too late, and fictions in law by relation will not divest an interest vested in a stranger. Stat. 8 Anne. c. 17, page 245; Act of Distress and Sale, 2 W. & M. Sess. 1, *cap.* 5.¹

BRAZIER v. HUDSON.

CHANCERY. 1836.

[*Reported 8 Sim.* 67.]

A TERM for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death letters of administration, limited as to the term, were taken out to Hodgson.

On the hearing of an exception to the Master's report as to the title to the estate, one question was whether the administrator was the proper person to assign the term to a trustee for the purchaser.

Mr. Jacob and *Mr. T. H. Hall*, in support of the exception.

Mr. Knight and *Mr. Coote*, in support of the report.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] Lord Holt, in his judgment in *Wankford v. Wankford*, 1 Salk. 299, says that an act done by an executor is valid, provided the will is ultimately proved, although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate had been taken, should be considered as valid if the will is ever afterwards proved. The consequence is that upon letters of administration to Hodgson, with his will annexed, being taken out, the assignment to Baxter will be established.

*Exception allowed.*²

¹ s. c. 11 Viner Ab. 133.

² See, *accord.*, *Johnson v. Warwick*, 17 C. B. 516 (1856).

FOSTER v. BATES.

EXCHEQUER. 1843.

[Reported 12 M. & W. 226.]

ASSUMPSIT by the plaintiff, as administrator of E. Pollard, deceased, for goods sold and delivered by the intestate, and also for goods sold and delivered by the plaintiff after his death, and before administration granted, and on an account stated with the plaintiff.

Plea, *Non assumpsit*.

At the trial before *Rolfe*, B., at the London sittings after last Trinity Term, it appeared that the defendants were partners in a company called the West African Company, trading to the coast of Africa, and that one Oldfield was their agent at Fernando Po. The goods in question had been sent by Pollard from this country to Africa for sale; he afterwards died intestate; and after his death, Oldfield, the defendants' agent, purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate. Subsequently to the sale, the plaintiff took out letters of administration to Pollard, and brought this action for the price of the goods. It was objected at the trial, that the plaintiff was not entitled to recover, as the letters of administration did not relate back to the time of the death of the intestate, so as to vest in the administrator the right to sue on a contract made after his death. The learned judge, however, left the case to the jury, who found a verdict for the plaintiff, leave having been reserved to the defendants to move to enter a nonsuit.

Kelly having in the early part of this term obtained a rule accordingly,

W. H. Watson and *Greenwood* showed cause.

Hoggins (*Kelly* with him), in support of the rule.

Cur. adv. vult.

The judgment of the court (*PARKE*, B., *GURNEY*, B., and *ROLFE*, B.) was now delivered by

PARKE, B. In this case, which was argued a day or two ago, we delayed giving our judgment, not on account of any doubt we entertained at the time, but in order that we might refer to the several authorities cited at the bar. We are of opinion that the rule to enter a nonsuit must be discharged. The only question is, whether the plaintiff could sue for goods sold and delivered by him as administrator of one Pollard, upon the facts which were in evidence on the trial. It appeared that the goods were sold after the death of the intestate, and before the grant of letters of administration, by one who had been the agent of the deceased on the coast of Africa; and that they were there sold avowedly on account of the estate of the intestate.

It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong-doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Tharpe v. Stallwood*, 12 Law J. N. S. 241, where an action of trespass was held to be maintainable. The reason for this relation given by Rolfe, C. J., in *Long v. Hebb*, Styles, 341, is, that otherwise there would be no remedy for the wrong done. The relation being established for the benefit of the intestate's estate, against a wrong-doer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party; and cases might be put in which the right to sue on the contract would be more beneficial to the estate than the right to recover the value of the goods themselves. In the present case, there is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator: and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent, the case of *Hull v. Pickersgill*, 1 Bro. & B. 282, cited by Mr. Greenwood, being an authority for that position. We are, therefore, of opinion, that the plaintiff is entitled to recover.

*Rule discharged.*¹

WELCHMAN v. STURGIS.

QUEEN'S BENCH. 1849.

[Reported 13 Q. B. 552.]

INDEBITATUS *assumpsit* by plaintiff as administratrix. 1st count, for money had and received to her use as administratrix. 2d count, on an account stated with her as administratrix. Plea: *Non assumpsit*.

On the trial, before Platt, B., at the last Monmouthshire Spring Assizes, it appeared that the defendant had lived as housekeeper with the intestate since his separation from his wife, the present plaintiff, and had, after his death in May, 1848, and before the taking out of letters of administration by the plaintiff in June of the same year, applied, in payment of the funeral and other expenses, the cash that was

¹ See *Leber v. Kauffelt*, 5 W. & S. 440 (Pa. 1843); *Hatch v. Proctor*, 102 Mass. 851 (1869).

in the house at the time of intestate's death, as well as divers sums of money arising from the sale of his effects, and also certain cash payments made to defendant after intestate's death by parties indebted to him. For the recovery of this money the present action was brought. The defendant's counsel contended that the plaintiff could not recover in this action, inasmuch as the money claimed had been received by the defendant, and paid away by her, before the grant of administration to the plaintiff, and the property of the intestate did not vest in plaintiff before such grant. The learned judge overruled the objection: and a verdict was found for the plaintiff on the first count, and for the defendant on the second.

Keating, for the defendant, now moved for a new trial on the ground of misdirection.

PATTERSON, J. I think we should allow of no doubt that the administratrix in this case is entitled by relation to sue the defendant for money had and received to her use. There are express decisions to show that she could have sued in trespass or trover, for a trespass or a tortious conversion of the same date. Now, as regards the money produced by the sale of the effects, there having been no affirmance of such sale by the plaintiff, she is in a position to bring an action of trover: she may also waive the tort, and bring an action on contract. With respect to the money due to the intestate, and received by the defendant, it is true that no privity existed between her and the plaintiff; but, as such money is due to the administratrix by relation, she may affirm the receiving, and sue for the money as had and received to her use. In *Foster v. Bates*, 12 M. & W. 226, the court said: "There is no occasion to have recourse to the doctrine, that one may waive a tort and recover on a contract:" but in the present case that doctrine must be applied; and, the letters of administration relating back, the administratrix may elect to treat the money as received to her use.

ERLE, J. With respect to the goods sold by the defendant, the case of *Fyson v. Chambers*, 9 M. & W. 460, is another authority to show that the plaintiff has a right to sue: and I do not think that any distinction can be drawn, as regards the relation back of the letters of administration, between goods and money specifically belonging to the intestate, or due to him, at the time of his death.

Rule refused.

MORGAN v. THOMAS

EXCHEQUER. 1853.

[Reported 8 *Ecch.* 302.]

TROVER for household furniture. Pleas, Not guilty, and not possessed; upon which issues were joined.

At the trial, before *Crompton*, J., at the last Carmarthen Assizes, it appeared that the action was brought by the plaintiff, as administrator of his father, Thomas Morgan, for the recovery of the value of certain furniture which had been seized by the defendant as sheriff of the county under a writ of *fi. fa.* The intestate had resided for some years in the town of Carmarthen, and died in September, 1849. His wife and two daughters continued to reside in the house which they had occupied, but the plaintiff lived in a different part of the town. In February, 1851, the furniture of this house, which the widow so occupied, was seized under a writ of *fi. fa.*, upon a judgment obtained against her. The plaintiff served a notice on the defendant not to sell the goods, as being part of the intestate's estate, and not the widow's. The defendant, however, sold the goods, after having taken an indemnity from the execution plaintiff. In the following month of March, the plaintiff took out administration to his father, and subsequently brought this action to recover the value of the goods so seized and sold. Under these circumstances, it was contended, on the part of the defendant, that if the jury should be of opinion that the plaintiff had, after his father's death and before the taking out of administration, assented to the property of the intestate being taken by his mother and the other children, in satisfaction of their shares in the intestate's personal estate under the Statute of Distributions, the defendant was entitled to a verdict. The learned judge left that question to the jury, who found that "the plaintiff had tacitly assented, but that he had done no act." On the part of the plaintiff it was contended, that, although the letters of administration had such a relation as would maintain the action, *Tharpe v. Stallwood*, 5 M. & Gr. 760, yet there was no evidence of any assent on the part of the plaintiff as administrator; and if there was such evidence, that, inasmuch as it did not appear that there were no debts due from the estate unpaid, such assent, not being for the benefit of the estate, was of no effect. A verdict was entered for the plaintiff for the sum of £11 2s. 9d., with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

Evans obtained a rule *nisi* accordingly, or for a new trial.

Davison (*Bowen* with him) showed cause.

Evans and *Grove*, in support of the rule.

POLLOCK, C. B. I am of opinion that this rule ought to be discharged. Unless the conduct of the party whose act is relied upon as binding the estate of the intestate be done by him in the character of administrator, it can have no operation upon the estate, and, accordingly, the utmost effect that can be given to the defendant's argument is, that where a party does an act professedly intending to take out letters of administration, and afterwards becomes administrator, the administration has relation back, and gives effect to what he had done by anticipation. But if that proposition be true in point of law, this case would entirely fail upon the facts, for there was no evidence whatever to warrant the jury in finding that the plaintiff had assented. Upon considering all the facts, there is no evidence bearing out the proposition of an assent, although it is true that the plaintiff was living at the time in the neighborhood, and was probably aware of what the parties were doing, and did not choose to interfere; yet it does not follow that he was acting in the character, or even in the assumed character, of administrator. With respect to the legal consideration of the case, the only matter adduced by the defendant's counsel, which is in the least in his favor, is what fell from the Court of King's Bench in *Kenrick v. Burges*, Moore, 125, and which turns out to have been a mere *dictum*, although, no doubt, the judges entertained that view of the question. But the modern authorities are opposed to the defendant's arguments, and, amongst other cases, that of *Woolley v. Clark*, 5 B. & Ald. 744, may be cited.

PARKE, B. I am of the same opinion; and I do not entertain a doubt upon the question. In the first place, there is no evidence whatever for the jury that the plaintiff ever assented, before he took out letters of administration, to the widow's taking this property as her share of the intestate's goods under the Statute of Distributions; because the principle is, that no consent can be implied against a person who has no power to dissent; and this principle is illustrated by the two legal maxims to which I have already referred. It is only where a man has the power of prohibiting a thing, that his omitting to exercise that power is evidence of his assent. Now at the time the intestate's widow took possession of this property, the plaintiff had no power to prevent her from so doing. He had no interest in the goods, and no power to take them away from her; and therefore, as he had no power to dissent, he did not assent by not interfering in the matter. Even supposing that he had in the most solemn manner, by an instrument under his hand and seal, assented to her doing so, it is perfectly clear from all the modern authorities, which are uniform upon the question, that she would not have thereby acquired a right to claim the property. An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such per-

sons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It was not the duty of the plaintiff, acting in the character of administrator, to assent to a legacy till he had seen all the just debts owing by the estate duly satisfied.

ALDERSON, B. There was no evidence to warrant the jury in finding that the plaintiff assented; and that being so, there is nothing to which the relation back can have reference.

MARTIN, B. There is no evidence whatever to entitle the jury to find that the plaintiff has given such an assent as that contended for; and upon this ground alone the rule might be discharged. Upon the other point, the authorities are also clear. With regard to the objection, that inconvenience might arise if a person were to be deprived of property of which he had been in possession for many years, say for twenty years, by administration being taken out, it seems to me that it might fairly be left to the jury to say, whether such property had not come into the possession of the party by gift or by will.

Rule discharged.

MONROE v. JAMES.

SUPREME COURT OF APPEAL OF VIRGINIA. 1814.

[*Reported 4 Munf. 194.*]

IN this case (which was an action of detinue in behalf of the appellant against the appellee), the following case was agreed by the parties; viz. that the negro woman slave in the declaration mentioned, was the property of Joseph Jones, senior, deceased, at the time of his decease, and subject to the disposition of his last will and testament, set forth *in hæc verba*; the executors appointed therein being James Monroe, Joseph Jones, the testator's son, and others; that the defendant bought her, for valuable consideration, from one George Legg, who bought from Joseph Jones, jun., deceased (*named* one of the executors in said will), for valuable consideration, after the said Joseph Jones, jun., had attained the age of twenty-one years, and after the said will was duly proved and recorded; he, the said Joseph Jones, jun., now deceased, not having then, or after, qualified as executor under said will; that no other person had qualified as executor of said Joseph Jones, sen., or taken out letters of administration on his estate, at the time of the sale of the said negro woman by Joseph Jones, jun.; that the plaintiff is the only regularly qualified executor of said Joseph Jones, sen., deceased; that the negro slave in the declaration mentioned, is in the defendant's possession, and was so at the time of institution of the suit; and that demand of her was duly made before said institution.

The following clause in the will related to the subject of the present controversy: "I give and devise unto my son Joseph Jones, and his

heirs and assigns, all my estate real and personal. In case he shall die before he arrives to lawful age, or, being of lawful age, shall die without a child or children to inherit the estate hereby given to him, it is my will that the same shall, after his death, be divided between the children of my late sisters Esther Tyler and Elizabeth Monroe now living, allowing my nephew Colonel James Monroe the first choice."

A verdict was found for the plaintiff, subject to the court's opinion upon the case agreed. The court entered judgment for the defendant; whereupon the plaintiff appealed.

Hay, for the appellant.

Stanard, for the appellee.

Friday, February 11th, 1814, the judges (COALTER, CABELL, and FLEMING) delivered their opinions, *seriatim*.

JUDGE COALTER. In England an executor, before probate, may do almost everything which he can do afterwards. He may take possession of the goods, pay and receive debts, make acquittances and releases of debts, take releases, sell, or give away the goods, assent to legacies, &c.; and these things do not require a subsequent probate to confirm them; for, if he die *after* any of these acts done, and before probate, yet they stand good. He may sue and be sued, but cannot declare until probate: — he may file a bill, and it will be good if he takes probate before trial. These are the only acts which I can discover, which require a probate to enable him as effectually to do, as though the probate had been taken. Nay, where A., B., and C. are executors, and A. refuses, and B. and C. take probate, there A. continueth executor, notwithstanding his refusal (the will being proved in the names of all), so as he still may release debts due to the testator, and B. & C. cannot maintain suit in their names alone, but must join A. also: — the probate in fact inures to him, and he may administer thereafter at his pleasure, and intermeddle with the goods, as well as the others; and if he survives, he will proceed with the administration, as I understand.

The reason of all which is, that there an executor may undertake the trust reposed in him, as well by acts *in pays*, signifying his consent to do so, as by taking probate before the ordinary; and every act of administration or intermeddling with the estate, even in a slight degree, makes him executor, and he *cannot afterwards* refuse, but must proceed to execute the will: — he can be sued as executor, and if he pleads that he neither is executor, nor ever did administer as executor (which is the common plea to free himself in such case), it will be found against him, on such intermeddling being proved. The goods of the testator are considered his property from the death of the testator; and before probate he may maintain trespass, replevin or detainue, for goods taken or trespass done, after the death of the testator; for these actions arise on his own possession.

There, too, the probate, as well as the *refusal*, have relation to *the death of the testator*. As where administration had been committed before any will proved or notified to the ordinary, and the adminis-

trator sold some of the goods, the executor brought detinue for these goods, and recovered them.

And a *refusal* shall have a like relation, so that the administrator may have an action of trespass for goods taken before administration committed.

In this country, the executor is to take an oath, and give bond and security, in every case except where by the will it is dispensed with, and there too, if the court think proper to require it. Whereas, in England, he gave no bond, except where a court of chancery, to prevent fraud, should interpose and require bond, or where the testator, by his will, made an executor conditionally, that he put in security, and *then* be executor.

The Statute of 10 Ann. *ch.* 2, § 12, was the first law requiring security in this State; and that did not require it generally, but only in such cases where the court should have reason to suspect that an executor might act fraudulently; and which provides that such a failure to give security should be construed a refusal to act as executor, and that administration *cum testamento annexo* might, thereupon, be granted. This Statute has a proviso substantially the same with that of 22 Geo. 2, *ch.* 5, hereafter mentioned, as to the power of the executor before probate, or administration, as aforesaid.

This latter Statute requires bond and security to be given generally, as first above stated; and in the 21st section is the following proviso: "that nothing herein contained shall be construed to abridge or restrain the power of executors over their testator's estates, until probate of the will, or *administration with the will annexed*, be obtained or granted; but they may *possess* themselves thereof, and till then *execute their trust*, as fully and amply as if this Act had never been made."

This Act also provides that a failure to give security shall amount to a refusal of the executor to act.

The question is, what effect this Act, together with the exception, or proviso, had on sales made by the executor thus required to give bond, and who, in fact, never did give such bond; the Act of 1785 simply continuing the power of executors before probate, as heretofore.

Under the first Statute above mentioned, where the court, *suspecting fraud*, required security, could it have been intended that the executor, notwithstanding such requisition, might sell, give away, and waste the whole estate, and in fact commit the very fraud intended to be guarded against; so that there would be a dry and naked administration only to be granted? Suppose bond to be required in England by a court of chancery, would a sale, after the decree, be good, the executor never giving bond? Must not the purchaser notice this decree, and buy at his peril? But here, security is required by law, which is notice to all the world. If there are two or more executors in this country, and one refuses to give bond, and the other takes probate, can the refusing executor, who never gives bond, sell and dispose of the estate, as in England he may do?

It appears to me that the proviso must either destroy the great

objects of the law, or be itself declared void as contravening those great objects ; or such a construction must be given that both can, with reason and propriety, stand.

The Statute in this country most materially innovates on the common law doctrines above noticed, in one great and important point, a proper consideration of which, I think, will aid much in guiding us in this inquiry.

By those doctrines, an executor once intermeddling with, or administering, in the smallest degree, the assets, takes upon him the executorship, and he can never afterwards refuse. Here the very clause requiring bond, and the proviso under consideration, suppose an intermeddling by the executor before bond given, by the terms of which he is to account for the assets that *have* or *may* come to his possession ; yet the refusal to give that bond shall here be a refusal of the executorship, and administration may be granted ; but refusal, as well as probate, relates to the death of the testator, who, on such refusal, is supposed to die intestate, as to the appointment of executors, and therefore the person named as such stands as having never been executor. I suppose it is for this reason, probably, that a refusing executor does not join in a suit, and is not sued, in this country. From this it would seem to result, that a qualification, and giving bond, are annexed, in all cases, *by law* (as it may in England, by the will itself), as conditions preceding the full right of the executor finally to act ; and that, consequently, a probate, according to our law, will be necessary to confirm *mesne* sales, &c., made before such probate.

By the proviso, he may *possess* himself of the goods, and proceed to *execute* the *trust*. How? By wasting and giving away the goods? Surely not : — such acts would not be in execution, but in fraud of the trust. Our law does not direct a sale even of perishable goods, until after probate ; and such is the multiplicity of courts, and the facility with which that may be obtained, that a sale or alienation of the effects can seldom be necessary in this country before probate. But if it should be necessary (as in some cases it may), it must be by one who is executor, that is, who shall give bond ; for if he does not, he shall be considered as no executor : he cannot both be executor and no executor : he cannot both accept and refuse ; and the person purchasing must trust to this subsequent act of confirmation. It is better it should be so than that the proviso should counteract the whole law.

The executor may do many things in the *execution of his trust*, before probate, which, though they would have been sufficient to make him executor in England, shall not here, if he refuse to give bond. He may see to burying the deceased, take possession of the goods, take care of them until probate or administration granted ; may sue to prevent the Statute of Limitation from running ; may be sued, for the same reason, &c. But if he proceeds actually to administer the estate, he must at least confirm those acts by probate and giving bond ; for, until that is done, he may refuse the trust, and is no executor ; and by that alone he elects to be executor.

This is the only way in which I can reconcile the Act to itself, and to the principles of the common law above mentioned. Either the proviso must defeat the law, or be itself defeated, or they must both receive such construction as that they may stand together. The law was intended to prevent frauds and embezzlement, and therefore ought to be construed liberally, so as to advance the remedy, and prevent the mischief. I can perceive little injury accruing, either way, under the construction now put; and if the powers of executors before probate are narrowed by it, and if estates may be injured through defect of power in the executor, it will but rarely happen; whereas, if their powers should be as large as is contended for, the evils would be incalculable.

On the whole, I think the law, on the case agreed, is for the appellant; and that, therefore, the judgment of the superior court of law is erroneous, and must be reversed, and judgment entered for the appellant.

JUDGE CABELL. The question presented by the case agreed is, whether a sale, for valuable consideration, of a slave belonging to the estate of a testator, by a person named as executor, but who never qualified by giving bond and security, is good against the executor who did qualify.

Were this case to be decided by common law principles, without regard to our Act of Assembly, it would not admit of doubt. An executor derives his power from the will; and, at common law, nothing was required to invest him with the full exercise of that power, for almost every possible purpose, but his acceptance of the trust. By any intermeddling with the estate, which amounts to a partial administration, he is considered as having accepted the trust, and taken upon himself the whole administration; and he becomes thereby, *ipso facto*, complete executor: and it is on this ground, and on this only, that, although he may die before probate of the will, yet the acts done by him will be valid.

These principles of the common law must be applied to, and must govern this case, except so far as they may have been changed by our Acts of Assembly. It is impossible to read our Statutes upon this subject, without being struck by one most important change. To the confidence reposed in the executor by the testator, there is superadded the necessity of giving bond and security for the faithful discharge of the duties of the office. The refusal or failure to give security is expressly declared to amount to a refusal of the executorship; and the court shall, thereupon, grant letters of administration, with the will annexed, to the person to whom administration would have been granted if there had been no will. In this country, therefore, he is not, as in England, complete executor by a mere partial administration of the estate. To make him complete executor, it is indispensably necessary that he shall qualify by giving bond and security. The only principle, then, which at common law gave validity to the acts of an executor who died before probate, is

done away by this Statute: and, if there had been no further provision in the law, I presume the opinion would have been universal, that the acts of an executor who never qualified would not be valid against one who had qualified. But it is contended, that the twenty-second section which declares, that "the power of executors over their testators' estates before probate of the will is not hereby restrained, but shall continue as heretofore," is so express and positive, that it will be impossible to invalidate any acts of the executor, however ruinous to the estate, and even although he should afterwards refuse or fail to give security. The certain consequence of this construction would be to defeat the great object of the Legislature, the protection of the rights of creditors and of legatees; for any executor, so disposed, might waste the whole of the estate before the court could arrest his progress by granting letters of administration. Such inconsistency cannot be attributed to the Legislature. A just construction will give harmony to all parts of this important Statute. The interest of the estate will, almost always, require many acts to be done before an executor can qualify. Without defining any particular cases, the law therefore has wisely provided that the power of an executor before probate shall remain unrestrained. The confidence reposed in him by the testator, his acceptance of the trust, and the necessity of the case, require that he have power to do whatever he might have done at common law. As he *may* become complete executor, by giving bond and security, and as he *ought* to do so after having intermeddled with the estate, the law so far regards him as executor, as to consider his acts valid for the present; and they will become irrevocably so, provided he shall perfect his character as executor, by a subsequent qualification. But, if he refuses or fails thus to qualify, he is considered as having altogether refused the executorship; and this refusal relates to the death of the testator. As to him, the will is considered as having never been made; and, thus, the only foundation of his authority being done away, all his acts are invalidated.¹

ALVORD v. MARSH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[Reported 12 Allen, 603.]

CONTRACT brought by the administratrix of the estate of Justus B. Alvord, against the administrators of the estate of Robert G. Marsh, to recover \$100 for work done by Alvord for Marsh. The bill of par-

¹ The opinion of JUDGE FLEMING in concurrence is omitted.

See, *accord*, *Gay v. Minot*, 3 Cush. 352 (Mass. 1849); *Stagg v. Green*, 47 Mo. 500 (1871). Cf. *Carter v. Carter*, 10 B. Mon. 827, 329 (Ky. 1850). *Contra*, *Magwood v. Legge*, Harp. 116 (So. Car. 1824); *Martin v. Peck*, 2 Yerg. 298 (Tenn. 1829); *Hogan v. Wyman*, 2 Or. 302 (1868); *Thiefs v. Mason*, 65 N. J. Eq. 456, 460 (1897). See *Shoenberger v. Lancaster Sav. Inst.*, 28 Pa. 459 (1857); 1 Woerner, Amer. Law Adm. (2d ed.) § 172.

particulars annexed to the writ consisted of a charge for "work and labor each month in 1860, 1861, \$300." The defendants admitted that Alvord performed work for Marsh, but professed their ignorance of the amount and value of his services; averred that Marsh and the plaintiff had a settlement, and that he paid her the balance found due on accounting together; and also filed a declaration in set-off, with an account of about two hundred items, amounting together to \$788.95.

The case was submitted to the determination of the Superior Court upon the pleadings, and the report of W. B. C. Pearsons, who made an award as referee under rule of court. The following is an exact copy of the whole of this award, with the exception of the merely formal parts:

"It appeared in evidence that plaintiff's intestate died June 5th, 1861, and letters of administration were issued to plaintiff Nov. 5, 1861. The defendant relied upon a set-off, embracing items of account between June 5th, 1861, and Sept. 1st, 1861, of goods sold, \$11.53; labor of man, \$9.00; funeral expenses, \$15.87; cash, \$6.05; and rent of tenement for June, July, and August, 1861, \$11.00, furnished to the plaintiff. It was not proved that these items were furnished in pursuance of any contract with the intestate. The plaintiff objected to the allowance of any of these items, as having been made between the death of plaintiff's intestate and the issuing of letters of administration.

"The defendant also relied upon a receipt duly proved, of which the following is a copy: 'Holyoke, Aug. 30, 1861. Received of R. G. Marsh twenty dollars in full of all demands on account of the estate of Justus B. Alvord, late of Holyoke, deceased, also in full of house-rent, and all other bills against myself to Aug. 1st, 1861. (Signed) NANCY A. ALVORD. Attest: W. A. JUDD.' The amount actually paid upon this receipt was \$17.00, and it did not pay the full balance, as appeared upon a careful computation of the books, by the amount of \$1.20.

"I therefore allow in defendant's set-off the items of goods sold, \$11.53; funeral expenses, \$15.87; cash, \$6.05; and disallow for labor of man, \$9.00, and rent of tenement in July and August, \$7.00. I also allow the plaintiff \$1.20, as appears by the correct computation of the books, and adjudge that the plaintiff recover of the defendant the sum of seventeen dollars and twenty cents, as damages and costs taxed at. The costs to be agreed by the counsel for parties, except referee's costs."

Judgment was thereupon rendered for the defendant, and the plaintiff appealed to this court.

G. M. Stearns, for the plaintiff.

J. Wells and *A. L. Soule*, for the defendants.

HOAR, J. The taking out letters of administration relates to the death of the intestate, and by operation of law makes valid all acts of the administrator in settlement of the estate from the time of the death.

It therefore legalizes receipts of property by the administrator for which he would otherwise have been responsible as executor *de son tort*; and requires him to account for them in regular course of administration. *Shillaber v. Wyman*, 15 Mass. 322; *Andrew v. Gallison*, Ib. 325, n.; *Priest v. Watkins*, 2 Hill (N. Y.) 225. It has indeed been doubted whether an executor *de son tort* can give any title to the goods of the intestate as against the rightful administrator, especially where the conveyance is the single wrongful act which makes him executor *de son tort*. *Mountford v. Gibson*, 4 East, 441; *Pickering v. Coleman*, 12 N. H. 148. But no such question can arise where, as in the present case, the alleged executrix *de son tort* becomes herself afterward the lawful administratrix. Her acts of receiving debts due to the estate, or property belonging to it, become by relation lawful acts of administration, for which she is liable to account, to the same extent as if they had occurred after the letters of administration were granted. The liability thus imposed upon her necessarily involves a validity in her acts which is a protection to those who have dealt with her concerning the estate. The plaintiff, therefore, if she has undertaken to receive a debt due to the estate which she represents before her appointment as administratrix, and has given a discharge or acquittance therefor which would have been valid if she had then been duly appointed, has made herself chargeable with the whole amount of the debt; her subsequent appointment gave complete validity to the transaction; and she cannot maintain her action.

It then remains to determine whether, upon the facts agreed, the defendant paid or satisfied the debt due from him to the intestate. The claim annexed to the plaintiff's writ is for work and labor, \$300. The defendant has filed a declaration in set-off amounting to \$788.95, and embracing a very large number and variety of charges. Among them were some claims against the administratrix personally, for money and rent due from her after the death of her intestate. She gave to the defendant a receipt in full of all demands on account of the estate, including a settlement of these personal liabilities, on the payment by him of \$17. The facts show that, upon a careful computation of all amounts proved on each side, this sum was not sufficient by the amount of \$1.20. But we can have no doubt that an administratrix, who is herself indebted to a debtor of the estate, may, if she chooses, accept a discharge of her own debt toward the payment of the debt due to her as administratrix. By so doing she makes herself answerable to the estate for the whole debt which she thus settles and discharges. And while it is clearly settled that the receipt of a less sum is no valid discharge of a larger amount which is due, yet this applies only to the case of an ascertained and undisputed debt. The rule has no application to the case of an accounting together between two parties having various and unliquidated demands against each other. As the plaintiff's demand was for labor, of which both the time and the price were to be proved or agreed; as the defendant had an account of a much

larger amount; as questions of interest might very likely arise; and as the sum fixed by the parties, without fraud or concealment of facts, was within such a trifling amount of the sum appearing to be due upon a new and "careful computation of the books;" the case comes precisely within the authority of *Donohue v. Woodbury*, 6 Cush. 148. The settlement between the plaintiff and defendant was in the nature of an *insimul computassent*; and the receipt in full was a bar to the action.

Judgment for the defendants.

GILKEY v. HAMILTON.

SUPREME COURT OF MICHIGAN. 1871.

[Reported 22 Mich. 283.]

ERROR to Kalamazoo Circuit.

The plaintiffs below, as administrators of the estate of Harvey Hamilton, brought their action in the Circuit Court of the County of Kalamazoo against Edward Gilkey, of replevin for a horse, which belonged to their intestate at the time of his death. The plaintiffs, who are respectively the son and wife of Harvey Hamilton, subsequent to the death of Hamilton and prior to the issuing of letters of administration to them, had delivered the horse to an agent with instructions to sell or dispose of him. Under these instructions the agent transferred the horse to defendant Gilkey, who claimed that the transaction was a valid sale, and refused to deliver the horse to the plaintiffs when demanded by them after they had received their letters of administration. On the trial the court excluded all evidence of the instructions by the plaintiffs relative to the sale or transfer of the horse, prior to their appointment as administrators; and, under the charge of the court, they had a verdict and judgment, which the defendant, Gilkey, brings into this court for review.

Arthur Brown and *D. D. Hughes*, for plaintiff in error.

H. F. Severens, for defendant in error, was stopped by the court.

COOLEY, 'J. This case presents the question whether, where one interferes with the property of a deceased person and sells a portion thereof without right, and is afterwards appointed administrator on the estate of such deceased person, he will be estopped by his prior acts from recovering the property for the estate.

The plaintiff in error insists that he is; and he calls our attention to a considerable list of judicial decisions in which it has been held, that when one is appointed administrator on the estate of a deceased person, his title relates back to, and takes effect from, the date of the death of the intestate. And the inference he deduces from these cases is, that the legal effect of whatever is done by the person thus appointed inter-

mediate the death of the intestate and his own appointment, is precisely the same as though he had held letters of administration at that time.

The doctrine of relation is a familiar and important one, and, indeed, is quite necessary to the protection of the interests of the estate. But this necessity is the reason upon which it rests, and it is no part of its purpose to legalize lawless acts which may, and generally would, work the estate a prejudice.

Under our probate system, an administrator is a mere officer of the law, who has title to the assets for the purpose of collecting and disposing of the same for the benefit of creditors and the next of kin. When he receives his letters, his title is correctly said to relate back to the death of the intestate; but it is an official title, and his being clothed with it cannot make good the prior acts which he has not assumed to do officially, but in a different capacity from that in which he is now acting. One man appointed administrator cannot have less power than any other man would have had if he had received the same appointment; the force and effect of his letters cannot be limited and restrained by his previous acts in his private character, any more than the official authority of a sheriff or any other public officer can be limited and restrained by what he may have done as an individual previous to his election. On his appointment, the administrator becomes vested officially, and for the purposes of the trust, with all such title as his intestate had to the personalty at his death; and he is neither obliged to, nor has he the right, to recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate by any one while the title was in abeyance.

The doctrine of executor *de son tort* is alluded to as having some bearing, but it is a doctrine not permissible in our system. Our law looks to the interest of the estate, and employs the administrator as a mere instrument to guard, defend, and advance that interest. To apply the doctrine of estoppel as between the administrator and one whom, as an individual, he may have dealt with improperly, would be to treat the administrator as more important than the estate, — the agent as more important than the principal, — the instrument as more to be regarded than the object to accomplish which the instrument is created. In truth, the administrator is merely the representative of the estate: the estate, in his person, is the party to the contracts he makes and the suits he brings; and to make the doctrine of estoppel applicable, it must be shown that the equities it rests upon are equities against the estate. But certainly there is nothing in the fact that a man is appointed administrator, who has previously misconducted himself, which can justly raise against the estate any equities, or which can justly deprive the creditors or next of kin of any of their rights in its assets.

We do not deem it necessary to examine this subject in detail, because we regard the previous decisions in *Cullen v. O'Hara*, 4 Mich. 138, and *Morton v. Preston*, 18 Mich. 71, as conclusive upon it; and

we have only alluded in very general terms to what seem to us the obvious reasons on which those cases rest.

The judgment must be affirmed, with costs.

The other justices concurred.¹

NOTE. — In *Holland v. King*, 6 C. B. 727 (1848), it was held, that an option given to the executor or administrator of a deceased partner to succeed to such partner's share, if exercised within three months of his death, was not well exercised by the widow of a deceased partner, who gave notice of her intention to avail of the option within the three months, but did not take out letters of administration until they had expired.

In *Regina v. Tippin*, Car. & M. 545 (1842), upon an indictment for stealing from the body of a dead man goods which had belonged to him, an allegation that they were the property of the bishop of the diocese in which he died was held good. Cf. *Wonson v. Sayward*, 13 Pick. 402 (Mass. 1833).

In *People ex rel. Gould v. Barker*, 150 N. Y. 52 (1896), the commissioners of taxes in the City of New York on Jan. 9 assessed a tax to the relators as executors and trustees under the will of Jay Gould. This will was not admitted to probate until Jan. 13. The tax was held to be valid.

SECTION II.

WHAT INTERESTS PASS TO THE EXECUTOR OR ADMINISTRATOR.

A. *Leaseholds.*

DOE d. SHORE v. PORTER.

KING'S BENCH. 1789.

[Reported 3 T. R. 13.]

THIS was an action of ejectment for a messuage, cottage, and half an acre of land, brought upon the demise of John Shore, administrator of the effects and credits of William Shore, deceased; which demise was laid in the declaration to commence from the first of March, in the 27th year of the reign, &c., to have and to hold the said premises for seven years, &c. To this the defendant pleaded not guilty; and at the trial, lease, entry, and ouster being confessed, the plaintiff produced one William Shore as a witness, who gave evidence as follows: "The premises did belong to me. I granted a lease to the defendant; William Shore was under-tenant to him; he paid me the rent reserved by Porter's lease two or three times; he paid to Lady-day, 1786. William Shore died the 31st of October, 1786. Porter accepted the deceased as his tenant on my recommendation. Porter paid me rent while the deceased was in possession, and told me I need not take the trouble of coming over to him, but receive the rent of the deceased. The deceased came in in the summer of 1780; my rent was due every Lady-day." The plaintiff also proved the letters of administration duly taken

¹ See, accord, *Haselden v. Whitesides*, 2 Strob. 363 (So. Car. 1847).

out. To this evidence the defendant demurred, and the plaintiff joined in demurrer.

Palmer, in support of the demurrer.

Law, contra, was stopped by the court.

LORD KENYON, C. J. The lessor of the plaintiff, who is the administrator of William Shore, claims as tenant from year to year the property which is the subject of this ejectment. And the first question is, What title is proved to have been in William Shore at the time of his decease, by the evidence stated on this record? And I think that the only inference to be drawn from it is, that he had that interest which his administrator says he had, namely, a tenancy from year to year so long as both parties pleased. As between the original parties, as long as both of them lived, he could not have been dispossessed without six months notice ending at the expiration of a year. But it is argued that though this was the interest which William Shore had, a different interest devolved on his personal representative. On this question I do not know how to state a doubt; for this was a chattel interest from year to year as long as both parties pleased; and it seems clear to me, that whatever chattel the intestate had must vest in his administrator as his legal representative. Then it is supposed that some inconveniences may result from such a determination: but I see none; and many inconveniences might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months previous notice. And all the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavored to provide by raising the implied contract, exist equally in the case of their personal representatives. Then is there any objection in point of form against the plaintiff's recovering in this ejectment? The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment; the whole of which is an absolute fiction. And this fiction does not even affect the case of an action for the mesne profits. The case cited from Levinz [*Roe v. Williamson*, 2 Lev. 140; 3 Keb. 490] is entitled to greater consideration than that in Keble, who was a bad reporter; and according to the former report the question was adjourned; and Twisden, J., who was a very able lawyer, was of a different opinion from the two other judges; besides, these kind of proceedings were not then so well understood as they are at this time. And the doctrine in Keble has been entirely exploded of late years. Therefore I am of opinion that there is no ground for either of the objections.

ASHHURST, BULLER, and GROSE, JJ., concurring.

*Judgment for the plaintiff.*¹

¹ As to estates *pur auter vie* which pass to the executor or administrator, see the note on occupancy, p. 29, *ante*.

B. *Goods conveyed in Fraud of Creditors.*

OSBORNE v. MOSS.

SUPREME COURT OF NEW YORK. 1810.

[Reported 7 Johns. 161.]

THIS was an action of trespass *quare clausum fregit*, &c. The declaration stated, 1. That on the 10th of September, 1809, the defendant, at Moreau, in Saratoga County, broke and entered the close of the plaintiff, and took and carried away one pair of oxen, of the value of 200 dollars, and two cows, of the value of 100 dollars. 2. For taking and carrying away the same chattels. The defendant pleaded as to the force, &c., Not guilty; and as to the residue, that before, &c., to wit, on the 11th September, 1809, the defendant was legally appointed administrator of Samuel Hodges, deceased; that the intestate was possessed, as of his own proper goods, of the said chattels, and that the defendant, as administrator, entered and took the chattels, and this he is ready to verify, &c.

The plaintiff replied, that before, &c., to wit, on the 7th of August, 1809, in the life of the intestate, at a justice's court, held, &c., he, the plaintiff, by the judgment of the court, recovered against the intestate 20 dollars and 3 cents, and that, on the 8th of August, in the life of the intestate, he obtained execution upon the said judgment, and delivered it to a constable, who levied on the said chattels, in the lifetime of the intestate, and gave notice of the sale for a day certain; and that the intestate died before that day, viz., on the 19th of August, 1809; that the sale of the chattels took place at the day appointed; and the plaintiff purchased them as the highest bidder, and they were delivered to him by the constable; and this he is ready to verify, &c.

The defendant rejoined, that before the said judgment, and before the debt arose for which the said judgment was rendered, the intestate was indebted to the defendant in 200 dollars, which the plaintiff knew when the judgment was rendered, and when the debt arose; that the said chattels were all the goods of the intestate; that the debt or demand of the plaintiff was fraudulent or covinous, and made by the plaintiff and intestate to cheat the defendant and the other creditors of the intestate; and that the judgment was procured by the plaintiff and intestate, to defeat the defendant and the other creditors; that the execution and sale were contrived and intended for the same purpose, and with a fraudulent intent on the part of the plaintiff and the intestate; and this he is ready to verify, &c.

There was a general demurrer to the rejoinder, and a joinder in demurrer.

H. Bleecker, in support of the demurrer.

Skinner, contra.

PER CURIAM. The defendant justifies, as administrator of Hodges, the taking of the goods in question from the possession of the plaintiff; and he denies the right of the plaintiff to hold them under the judgment and execution which he had against the intestate, because the judgment, execution, and sale were all procured by covin and fraud between the plaintiff and intestate, to cheat the creditors of the intestate; and this fact is admitted by the demurrer. But the case of *Hawes v. Leader*, Cro. Jac. 270; Yelv. 196, is an answer to this defence, and completely destroys it. In that case the intestate made a grant of his goods to B. by fraud between him and B. to cheat the creditors, and he kept possession of the goods, and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud and the Statute of 13 Eliz., which declares all such gifts and grants void as against creditors; but, on demurrer, the plea was held bad, and judgment was rendered for the plaintiff, on the ground, among others, that the deed was void only as against creditors, but that it remained good as against the party himself, and his executors and administrators. This ground of the decision is mentioned by Yelverton, in his report of the case, with *quod nota*; and he was counsel for defendant, and his reports are among the best of the old authorities.

The defendant further sets up in his defence, that he was a creditor, as well as administrator of the intestate. This was not stated in his *plea*, but in his *rejoinder*; and it is stated rather as inducement than as matter of justification. It does not, however, alter the case. As creditor, he had no right to take the goods without suit. He was still a *trespasser*; and in his character of administrator he could not attack the judgment on the ground of fraud. His remedy, as creditor, would have been to have sued the plaintiff for his debt, and charged him as executor *de son tort*. This he could have done, notwithstanding he was administrator; and the case of *Ashby v. Child*, Styles, 384, is expressly to this point. The plaintiff is therefore entitled to judgment.

*Judgment for the plaintiff.*¹

¹ See, accord, *Kinnemon v. Miller*, 2 Md. Ch. 407 (1849).

In *Backhouse v. Jett*, 1 Brock. 500 (U. S. 1821), it was held, by MARSHALL, C. J., that property fraudulently conveyed by the deceased to A was not assets in the hands of A as administrator of the deceased's estate. But see, contra, *Shears v. Rogers*, 3 B. & Ad. 362 (1832), where the property had remained in the hands of the deceased until his death.

BUEHLER v. GLONINGER.

SUPREME COURT OF PENNSYLVANIA. 1834.

[Reported 2 Watts, 226.]

ERROR to Dauphin County, Common Pleas.

Replevin by Peter Gloninger against Maria Buehler, William N. Irvine and Peter Keller. George Buehler purchased the goods for which the replevin was brought, and gave his notes for them, with Peter Gloninger, the plaintiff, and George Oves as his securities. The property, at the time of its purchase, was transferred by bill of sale to Gloninger and Oves as their security, but went into the possession of George Buehler, who agreed that Gloninger alone should hold that bill of sale, as a security also for a debt due to him. George Buehler died in the possession of the property, without having paid the debt due to Gloninger, and this replevin was brought against the defendants, who were his administrators, for the goods mentioned in the bill of sale. The defendants, after having shown that they were administrators, had given bond and filed an inventory of the goods of their intestate, offered to prove that George Buehler was insolvent, and that the value of these goods was necessary for the payment of his debts. This evidence was objected to by the plaintiff, and rejected; the court being of opinion that the Statute 13 Eliz. was not applicable so as to bar the plaintiff's recovery, and this was the assignment of error.

H. Alrichs and *M. Clure*, for plaintiffs in error.

Foster and *Weidman*, for defendants in error.

The opinion of the court was delivered by

ROGERS, J. The attention of the court has been particularly directed to two errors on which the plaintiff in error mainly relies. First, the exclusion of evidence of the insolvency of Buehler the intestate; and secondly, that part of the charge which declares that the transfer of the property to the plaintiff and Oves, and to the plaintiff himself, was good against the defendants; and that they can make no defence that Buehler himself might not have made. The points depend upon the same principle, and may be considered together. There is no doubt that the Statute of 13 Eliz. only makes void a deed as against creditors, but not against the party himself, his executors or administrators; as against them it remains a good deed. 5 Binn. 109; 6 Serg. & Rawle, 531; 1 Yeates, 291; 4 Yeates, 95; and in *Osborne v. Moss*, 7 Johns. Rep. 161, it is decided, that when a person makes a fraudulent conveyance of his goods to another for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate; and an action may be maintained against the administrator for the goods. The law is the same although the administrator may be a creditor of the fraudulent

intestate. *Horner v. Leader*, Cro. Jac. 270; Yelv. 196, which is cited and relied on in *Osborne v. Moss*, is to the same point. In *Horner v. Leader*, the intestate made a grant of his goods to B. to cheat his creditors, and he kept possession of the goods and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud, and the Statute of Elizabeth, which declares all such gifts and grants void as against creditors. The plaintiff replied that the defendant, the administrator, had assets in his hands to satisfy the debts demanded, and that the deed of gift was made upon good consideration, &c. It is true that the replication was withdrawn, but yet in neither of the cases cited did it appear that there was not sufficient assets to pay the debts. There being no averment that the estate was insolvent, the presumption was, that the administrators had assets in their hands sufficient to pay the debts; and if so, these decisions are in strict accordance with the general principle, about which there is no dispute. Inasmuch as we are to take it, that the estate of Buehler is insolvent, this is substantially a contest between the fraudulent grantee and the creditors of the fraudulent grantor, and as such, comes within the prohibition of the Statute of 13 Elizabeth. The administrator is the trustee of the creditors, and in that capacity is bound to protect their interest. The personal representatives, in fact, have no interest in the controversy, as the case supposes that the assets are insufficient to pay the debts of the intestate.

*Judgment reversed, and a venire de novo awarded.*¹

NOTE.—As to assets acquired by an executor after his testator's death, see 2 Wms. Exec. (10th ed.) 1279-1307.

C. *Rights ex Contractu.*

ST. 13 EDW. I. (WESTM. II., 1285) c. 23. Executors from henceforth shall have a writ of accompt, and the same action and process in the same writ as the testator might have had if he had lived.²

¹ See *Doney v. Clark*, 55 Oh. St. 294 (1896). Cf. *Estes v. Howland*, 15 R. L. 127 (1885).

See also *Bethel v. Stanhope*, Cro. El. 810 (1601), and 1 Am. Lead. Cas. *48, 44. Cf. *Holland v. Cruft*, 20 Pick. 321 (Mass. 1838); *Harmon v. Osgood*, 151 Mass. 501 (1890).

² Rights of executors to "have actions of debts, accompts, and of goods carried away," were extended by St. 25 Edw. III. (1350) c. 5, to executors of executors; and rights "to demand and recover as executors the debts due" to the intestate, were given by St. 31 Edw. III. (1357) c. 11, to administrators.

ANONYMOUS.

COMMON PLEAS AND QUEEN'S BENCH. 1574.

[Reported *Jenk.* 241.]

A. B. AND C. are coparceners; they purchase other land than the coparcenary land to them and their heirs; and by indentures they covenant every one with the other respectively for them and their heirs, with every one of them and their heirs, that the survivor or survivors of them and their heirs shall convey to the heir or heirs of the others who die first, separately, at the costs of the heir or heirs, an equal part with the survivor or survivors; they purchased the land in Kent; A. and B. die, the heir of A. sues covenant against C. and alleges that he tendered to C. in Kent an assurance to be made of the said purchased land: whereas the sale was made in Kent, and the tender was, in truth, in the county of Middlesex; and the action of covenant was brought in Kent by the heir of A. and issue was joined upon the tender of the assurance, and it was found with the plaintiff: He had judgment, which was affirmed in error.

Resolved in this case: 1. That this is a real covenant which goes to the heir of the covenantee. 2. That the plaintiff has his election to bring his *action* of covenant, *either* in Kent where the purchase was made, or in Middlesex where the tender was made.¹

CHAMBERLAIN *v.* WILLIAMSON.

KING'S BENCH. 1814.

[Reported 2 *M. & S.* 408.]

ASSUMPSIT by the plaintiff as administrator, upon a breach of promise of marriage made to the intestate, laying the promise in the usual way; and the plaintiff avers that the intestate, confiding in the said promise, &c., remained sole and unmarried until her death, and was ready, &c., and although she requested the defendant, &c., yet the defendant did not when requested, or at any time, marry her, but refused, &c. And there were several other counts varying the promise; but the declaration did not allege any special damage, but concluded to the damage of the plaintiff as administrator, &c. Plea, *Non assumpsit*.

At the trial before *Bayley, J.*, at the last assizes for the county of Gloucester, the promise was proved, and it further appeared that the intestate kept a boarding-school, which, it was agreed with the defendant, that she should relinquish at Christmas, 1812, in order to be mar-

¹ The rest of the case, upon the sufficiency of the tender, is omitted; s. c. *sub nom.* *Wotton v. Cooke*, Dyer, 337 b (1674).

See *Ayers v. Dixon*, 78 N. Y. 318 (1879).

ried. In the preceding November, however, the defendant broke off all further intercourse, and soon afterwards the intestate's health began to decline, and she was compelled to quit her school, and died in the following May. The learned judge doubted whether the action were maintainable, but assuming for the time that it was, he directed the jury to consider of the damages as if the action had been by the intestate herself, for that whatever compensation in money she would have been entitled to, by so much she would have died the richer. The jury found a verdict for the plaintiff, damages £200.

In Michaelmas Term a rule *nisi* was obtained for arresting the judgment, on the ground that this action was not maintainable by the personal representative; or for a new trial, on the ground of a misdirection. And upon the first point the Stat. 4 Ed. 3, c. 7, *De Bonis Asportatis in Vita Testatoris*, and 31 Ed. 3, c. 11, were cited, and also Com. Dig. Administration, B. 13, "that by the equity of these Statutes an executor or administrator shall have every action for a wrong done to the *personal estate* of his testator," Latch. 168. But this, it was said, is not a wrong to the *personal estate*. And in *Mordant v. Thorold*, 1 Salk. 252; s. c. Carth. 133, it was resolved that the administrator was not entitled to a *scire facias* upon a judgment in dower obtained by his intestate, where she died before the damages had been ascertained on a writ of inquiry, because the writ of inquiry being in the nature of a personal action for the damages, it dies with the person. And as to the misdirection, it was objected that the criterion of damages could not be the same as if the action had been by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings; whereas the administrator could only be entitled in respect of the damage to or deterioration of her personal estate.

Peake (with *Dauncey*) now showed cause.

Jervis and *Abbott*, contra.

LORD ELLENBOROUGH, C. J., said it was a case of novelty, and importance in its principle, and that it had been ingeniously argued; the not finding any precedent for such an action made it very fit that the court should pause, in order to look into the cases. And LE BLANC, J., said that they could not but recollect that though the damages in actions of this sort were given strictly as a compensation, yet they were almost always considered by the jury somewhat *in pœnam*.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., delivered the judgment of the court in substance as follows:—

This was a motion in arrest of judgment in an action brought by the plaintiff, as administrator, for a breach of promise of marriage made to the intestate by the defendant. The declaration did not contain any allegation of special damage; and the question was, whether the action is maintainable by the personal representative. The action is novel in

its kind, and not any one instance was cited or suggested in the argument of its having been maintained, nor have we been able to discover any by our own researches and inquiries, and yet frequent occasions must have occurred for bringing such an action. This circumstance imports at least an opinion not very favorable to this species of action. However, that would not be a decisive ground of objection, if on reason and principle it could strictly be maintained. The general rule of law is, *Actio personalis moritur cum persona*; under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased; all such as arise out of the unskillfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered in this case as an increase of the individual transmissible personal estate, but would operate rather as an extinction of it; though that circumstance might have been compensated by other advantages. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation the court cannot intend it. On the ground, therefore, that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact shown to be, privy, we are of opinion that, in the absence of any authorities, this administrator cannot maintain this action. The cases which were cited on the other side do not appear to have such an immediate bearing on the question as to require that they should be reviewed and commented on. We are of opinion that this judgment must be arrested, and of course the motion for a new trial is thereby disposed of.¹

¹ See *Hovey v. Page*, 55 Me. 142 (1867). Cf. *Finlay v. Chirney*, L. R. 20 Q. B. D. 494 (1888), *post*; *Smith v. Sherman*, 4 Cush. 408 (Mass. 1849); *Wade v. Kallfleisch*, 58 N. Y. 282 (1874); *Chase v. Fitz*, 132 Mass. 359 (1882), in which cases it was held that the action did not survive against the legal representative. See also *Price v. Price*, 75 N. Y. 244 (1878).

KNIGHTS v. QUARLES.

COMMON PLEAS. 1820.

[*Reported 2 Brod. & B. 102.*]

ASSUMPSIT. The declaration stated that before the time of making the promise therein contained, and in the lifetime of the deceased, the deceased had contracted with one Savory for the purchase of certain premises at Thetford, which Savory assumed to have sufficient power and title to sell and convey to the deceased; and thereupon, in the lifetime of the deceased, (in consideration of the premises, and that the deceased, at the special instance and request of the defendant, had retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of Savory to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by Savory to the intestate as purchaser, for certain fees to be therefor paid by the intestate to the defendant,) the defendant undertook and promised the deceased, in his lifetime, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant, by virtue of his retainer, to investigate carefully the title of Savory to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c., did not nor would carefully investigate the title of Savory in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but on the contrary the defendant wholly neglected and refused to do so; and in the lifetime of the deceased the defendant, in violation of his promise and undertaking, caused and procured, &c., the deceased, without his knowledge or consent, to accept and receive, and the said deceased in his lifetime did accordingly accept and receive from Savory a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by Savory to the deceased in his lifetime, and the deceased paid Savory as the consideration-money in that behalf £2,000, by means of which the deceased, in his lifetime and until his death, held the premises on a bad and insufficient title, and was in his lifetime wholly unable to sell or dispose of the same. The count then alleged special damage to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts the defendant was charged generally and not as an attorney. To these counts the money counts were added.

Demurrer and rejoinder.

Doyle, Serjt., for *Blosset*, Serjt., in support of the demurrer.

The Court stopped *Frere*, Serjt., who was to have argued for the plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made

no difference in this case whether the promise were express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, — though it was clear, he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract. That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and as to the alleged omission of certain averments in the declaration, respecting the defendant's profession, at all events the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

*Judgment for the plaintiff.*¹

RAYMOND v. FITCH.

EXCHEQUER. 1835.

[Reported 2 C. M. & R. 588.]

LORD ABINGER, C. B.² The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop or top, timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings, or toppings, appearing to have been removed by the defendant. This question was argued in the latter part of the last term, before my Brothers PARKE, BOLLAND, GURNEY, and myself, and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the Statute,

¹ See *Orme v. Broughton*, 10 Bing. 533 (1834).

² The opinion only is here given.

4 Ed. 3, c. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, that *Actio personalis moritur cum persona*, is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the Statute law. These authorities as to actions of covenant will be found in Com. Dig. Administrator, B. 13, Covenant, B. 1; Bacon's Abridgment, Executors and Administrators, N.; and in the cases of *Mason v. Dixon*, Sir William Jones, 173; *Morley v. Polhill*, 2 Vent. 56; 3 Salk. 109, pl. 10, which was the case of an action by the executor of a deceased bishop for a breach in his lifetime of a covenant to repair in a former bishop's lease; *Smith v. Simonds*, Comberbach, 64, in which an administrator *de bonis non* recovered on a breach in the time of the testator for not discharging the land from encumbrance; and lastly, *Lucy v. Levington*, 2 Lev. 26; 1 Vent. 176, where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment. The old authorities are also many, that an action will lie upon every breach of contract, though not under seal. In March, page 9, pl. 23, Justice Jones said, "that it was agreed by the court, in what case soever there is a contract made to the testator or intestate, or anything which ariseth by contract, there an action will lie for the executor or administrator; but personal actions die with the testator or intestate." And in 9th Reports, 89 a, *Pinchon's Case*, in which the question was, whether an action of *assumpsit* for payment of a debt lay *against* an executor, it is laid down as follows: "As to the other objection, that this personal action of trespass on the case *moritur cum persona*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit, to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then, if he to whom the promise is made dies, his executors should not have any action, which no man will affirm; and an action *sur assumpsit*, upon good consideration, without specialty, to do a thing, is no more personal, *i. e.* annexed to the person, than a covenant by specialty to do the same thing;" and in Bacon's Abr. Executors (N), "An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might." These authorities have certainly been limited by the modern decisions, quoted on the argument, and are to be understood with some qualifications; but it will be found that none of those qualifications affect the present case. The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle*, 1 M. & Selw.

355, and 4 M. & Selw. 53, followed by that of *King v. Jones*, 5 Taunt. 518; 1 Marshall, 107, in which cases it was held, that, where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no farther, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or deviser, and the executor therefore must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the personal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain v. Williamson*, 2 M. & Selw. 408, in which it was held, that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord Ellenborough enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion of skill and attention, which cases are in substance actions for injuries to the person, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description — it is a case more favorable to the executors than those of *Morley v. Polhill*, *Smith v. Simonds*, and *Lucy v. Le-*

ington, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We therefore think that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Sir W. W. Follett, in support of the demurrer.

W. H. Watson, contra.

POTTER v. METROPOLITAN DISTRICT RAILWAY CO.

EXCHEQUER. 1874.

[*Reported 30 L. T. N. S. 765.*]

THIS was a demurrer to the plaintiff's declaration. The action was brought by the plaintiff as executrix of her late husband, Frederick William Potter, to recover compensation for the loss sustained by his estate in consequence of an accident to the plaintiff occasioned by the negligence of the defendants. The declaration stated that "the plaintiff, during the lifetime of her husband, the said F. W. Potter, became and was received by the defendants as a passenger to be safely and securely carried as a passenger from the Mansion House to the Victoria station, for reward then paid to the defendants by the said F. W. Potter, yet the defendants did not safely and securely convey the plaintiff upon the said railway, on the said journey, and so negligently and unskilfully conducted themselves in conveying the plaintiff upon the said railway on the journey aforesaid, and in managing the said railway and train in which the plaintiff was a passenger as aforesaid that by reason thereof the carriage which the plaintiff was about to enter was violently shaken, and the plaintiff was thrown down and greatly hurt and injured in her back and spine, and otherwise, and was unable for a long time to carry on and manage and assist in the business of her said husband of a restaurant keeper, as she had theretofore done, whereby the said F. W. Potter lost the benefit of the services of the plaintiff, and incurred expense in nursing the plaintiff and providing medical and other attendance for her, and lost the profit he would otherwise have made in the said business, and the benefit of the money he had expended in the same, and was put to expense in providing persons to assist him in carrying on the same in the place of the plaintiff, and the plaintiff, as executrix of the said F. W. Potter, claims," &c.

To this declaration the defendant demurred.

The plaintiff's points were: first, that the medical and other expenditure rendered necessary by the accident was an injury to the estate of

the said F. W. Potter; secondly, that the plaintiff could not have sued in respect of it in her own right; thirdly, that she could not have joined in the same declaration counts in her own right, and also as executrix.

The defendants' points were: first, that the cause of action alleged in the declaration does not survive to the executrix; secondly, that the cause of action which accrued to the testator in respect of the matter alleged in the declaration falls within the rule of law *Actio personalis moritur cum persona*; thirdly, that the declaration discloses no such injury to the personal estate as entitles the executrix to maintain this action.

Philbrick, Q. C. (*Giffard*, Q. C., with him), for the demurrer.

Murphy, Q. C. (*George Lewis* with him), *contra*, were stopped by the court.

BRAMWELL, B. It is clear that this action is in substance one of contract; *Alton v. The Midland Railway Company* shows that. In the judgment in *Knights v. Quarles*, it is said that, "if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear he in his lifetime might, at his election, sue the coach proprietor in contract or in tort, it could not be doubted that his executors might sue in *assumpsit* for the consequences of the coach proprietor's breach of contract." Now here there has been a breach of contract, which has caused a loss, which has fallen upon the personal estate. This demurrer, therefore, must be overruled.

FIGOTT, B., concurred.

*Judgment for the plaintiff.*¹

BRADSHAW v. LANCASHIRE & YORKSHIRE RY. CO.

COMMON PLEAS. 1875.

[Reported L. R. 10 C. P. 189.]

DECLARATION in substance stated that the testator, of whom the female plaintiff was executrix, in his lifetime carried on business as a boot and shoe manufacturer, and that, in consideration that the testator would become a passenger to be carried by the defendants upon their railway on a certain journey for reward to the defendants in that behalf, the defendants promised the said testator to take due care in carrying him whilst he was such passenger. Averments, that he became such passenger and of performance of conditions precedent. Breach, that the defendants did not take due care in carrying the testator whilst

¹ See *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192 (1878); 83 N. Y. 695 (1881).

such passenger on such journey, whereby he was injured, and incurred expense in medical attendance and otherwise in relation to his injuries, and was prevented from attending to his business, and from personally conducting the same and from realizing profits therein, and great loss and damage was occasioned to the personal estate of the testator.

Pleas: 1, denial of the promise; 2 and 3, denying the averment that the testator carried on business as alleged and the allegation of damage to the personal estate of the testator; 4, denial of breaches; 5, demurrer.

Issues and joinder in demurrer.

At the trial, before *Denman, J.*, at the last Manchester Spring Assizes, the facts were as follows:—The female plaintiff was the executrix of the testator, and he, while travelling on the defendant's railway, had been injured by a railway accident. He ultimately died from the injuries received, and it was not disputed that he had incurred expenses for medical attendance amounting to £40, and that the loss occasioned to his estate in respect of his being unable to attend to business previous to his death was £160.

It was contended, however, on the part of the defendants, that the maxim *Actio personalis moritur cum persona* applied, and that the action was not maintainable; and, secondly, that the damages for loss of business were too remote. The verdict was entered for the plaintiffs for £200, leave being reserved to the defendants to enter a verdict for themselves or to reduce the damages on the above grounds. It was agreed that the demurrer should abide the event of the argument on the rule.

A rule *nisi* had been obtained accordingly, against which

Sir J. Holker (Solicitor-General) and *R. G. Williams, Q. C.*, showed cause.

Herechell, Q. C., and *J. Edwards, Q. C.*, supported the rule.

GROVE, J. I am of opinion that this rule should be discharged. The action is brought by the executrix of a person whose death was caused by a railway accident, in respect of damages occasioned to the testator's estate. It is to be taken that the estate was damaged, not consequentially upon the testator's death, but by his inability to attend to his business in his lifetime, the direct and natural result of the injury he suffered. It is no doubt singular that up to the case of *Potter v. Metropolitan District Ry. Co.*, 30 L. T. (N. S.) 765, no action of this kind appears to have ever been brought, a circumstance which has been sometimes relied on as an argument against sanctioning a new form of action. It may, however, be that this is accounted for by the comparative infrequency of accidents of this sort in former times, and the fact that until Lord Campbell's Act the right to damages for the personal injury, as compared with which the damages to the estate would generally be a small matter, was lost by the death of the party injured. The same argument might have been applied to the action in *Potter v. Metropolitan District Ry. Co.*, up to the decision of which

case no action of the kind had ever been heard of, so far as I know, if we except the case put by way of illustration by Richardson, J., in *Knights v. Quarles*, 2 B. & B. 102.

The Court of Exchequer Chamber, nevertheless, held in that case that the action would lie, and by their decision we are bound, unless the present case is so far distinguishable as to render the same principle inapplicable. I am of opinion that it is not, and there is a sufficient ground of action here. The ground of action in both cases is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident.

Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact, that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act, take away any right of action that the executrix would have had but for that Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the Statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act. Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan District Ry. Co.*, or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death. For these reasons, I am of opinion that the action is maintainable. With regard to the distinction between the two classes of damages, it was contended that the damages in respect of the testator's inability to attend to business were too remote within the rule in *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. (Ex.) 179. The decision there was, that the defendants in an action of contract are only to be liable to the natural consequences flowing directly from their breach of contract, or which may be taken to have been contemplated by the parties. It would

be impossible to carry on the affairs of life if a contracting party were liable in respect of extraordinary and unknown sources of damage, a liability for which the consideration given might be wholly inadequate. This doctrine might be applied more plausibly if it were sought to recover consequential damages to the estate arising from the death, but what is here sought to be recovered is the immediate injury to the estate caused in the testator's lifetime by his incapacity to attend to business, the direct result of the accident. Such damages may well be considered as being within the contemplation of the defendants when they entered into the contract. I therefore think that both sorts of damages are recoverable, and that this rule must be discharged.

DENMAN, J. I am of the same opinion. Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator, and at the trial two heads of damage were shown: viz., £160, damage in respect of the business, which it was agreed had suffered to that amount, and £40, medical and other expenses. I am of opinion that the plaintiffs are entitled to retain the verdict for the full amount of £200.

The first question was, whether the action can be maintained at all. The action is for a breach of contract occurring in the lifetime of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's Act, that the only action that could be brought was under that Act, and that these damages could not be recovered as damages to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do.

In Williams on Executors, vol. 1, pp. 798, a work in itself of great authority, all the cases on the subject are commented upon and the law is stated entirely in accordance with the *dictum* of Richardson, J., in *Knights v. Quarles*. It is distinctly laid down that an executor may recover damages to the personal estate arising out of a contract, though an action of tort might have been brought for the personal injury, resulting from the same act of the defendant, before the death of the testator. The case of *Alton v. Midland Ry. Co.*, 19 C. B. (N. S.) 213; 34 L. J. (C. P.) 292, is also referred to in a note; and it is clear the learned author, who was a judge of this court, when that case was decided, looked upon the *dictum* of Willes, J., in that case as a confirmation of the opinion of Richardson, J., in *Knights v. Quarles*. He proceeds, however, to say that the rule there laid down must be taken to be limited by a qualification introduced by the modern decision of *Chamberlain v. Wilkinson*, 2 M. & S. 408, viz., that an action by the executor for breach of contract will not lie where the damage is purely personal, and there is no damage to the estate. In that case the action was for breach of promise of marriage, and the decision turns distinctly on the ground that there was no special damage stated on the record,

and so the executor could not have an action because the only damages recoverable were purely personal. Here, the damages are not personal in their nature, but are damages to the estate, and the case falls therefore within the rule as laid down by Sir Edward Vaughan Williams, and not the exception. Again, the case of *Potter v. Metropolitan District Ry. Co.*, though not exactly in point, is to some extent an authority in favor of the view we take. In one respect it was a stronger case, for it was doubtful there whether the declaration was in contract, whereas it clearly is so here. There the wife was the person to whom the injury was done, and she sued as executrix to her husband who had died, in respect of the damage to the personal estate. The case was not, therefore, one of personal injury ultimately causing death, and consequently is not on all fours with the present. The principle, however, of the decision is quite consistent with our judgment in this case. The rule to enter a nonsuit must for these reasons be discharged.

Then, it being admitted that if the action lies the £40 can be recovered, the only question that remains is, whether the £160 for loss of business can be recovered. It was said that the rule in *Hadley v. Baxendale* prevents this amount being recovered. I do not think so. Every plaintiff is entitled to recover the damages that are the natural consequence of a breach of contract. I apprehend that where the contract is to carry a particular man, A. B., safely, and by reason of the breach of such contract A. B. is personally injured, any damage actually caused to the estate of A. B. by his consequent incapacity to attend to business is a natural consequence of the breach of contract, and not too remote, or one which the defendants could say that they did not contemplate. The case is essentially different from that of a contract for the supply of a chattel. It was not suggested at the trial that the damage in question had not actually occurred, or could in any way have been mitigated by hiring a substitute, or otherwise. It appears to me, therefore, that the rule must be discharged on this point also.

*Rule discharged*¹

WYMAN v. WYMAN.

COURT OF APPEALS OF NEW YORK. 1863.

[Reported 26 N. Y. 253.]

APPEAL from the Supreme Court. The facts proved on the trial were these: John R. Wyman, the plaintiff's intestate, died in January, 1859, seised of a hotel, on which he had effected insurance to the amount of \$3,000. The policies ran to Wyman, "his executors, administrators, or assigns," and contained this clause, "the interest of the insured in this policy is not assignable unless by consent of this

¹ "With the single exception, so far as I am aware, of the case in the Common Pleas, *Bradshaw v. Lancashire & Yorkshire Ry. Co.*, there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action." — *Per MELLOR, J.*, in *Leggott v. Gt. N. Ry. Co.*, L. R. 1 Q. B. D. 590, 605 (1876).

"I yield to the decision in the Common Pleas, but without assenting to it." — *Per QUAIN, J.*, *Id.* 607.

corporation, manifest in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." Wyman died wholly insolvent, leaving a widow, the plaintiff, who took out letters of administration, and two children, his heirs-at-law, who were defendants. In October succeeding Wyman's death the insured property was destroyed by fire. The insurers adjusted the loss and paid the amount to David B. Prosser, Esq., who had been appointed guardian of the infant heirs, under a stipulation entered into by all the parties concerned that Prosser should hold the money subject to the direction of the court, to be paid to the parties to whom it might be adjudged to belong, the heirs, the administratrix or certain creditors, who, before the intestate's death, had recovered judgment against him, which was a lien on the insured property for an amount exceeding its value. Prosser insisted upon his right to hold the money for the heirs, and the action was in the nature of a bill of interpleader to try the right of the several parties. The decision of the Supreme Court, at General Term in the Seventh District, was that the plaintiff, as administratrix of Wyman, was entitled to the money, and not the heirs-at-law. From this judgment Prosser, as guardian of his wards, appealed to this court.

David B. Prosser, for the appellants.

John H. Reynolds, for the respondents.

EMOTT, J. The condition in the policy which is cited by the appellants refers to assignments or transfers of the policy itself or of the interest of the assured therein, and not to transfers of the title to the building insured, or the land on which it stood, whether such transfers are voluntary or by operation of law. The clause is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or termination of the interest of the assured in the policy, and not in the premises insured, which, when made without consent, is to avoid the policy under this condition.

Policies of insurance against fire, however, are personal contracts with the assured. They are agreements to indemnify him against loss, and not guarantees of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. In the present instance, as ordinarily with us, in policies of insurance against fire, the contract is made with the assured, "his executors, administrators, and assigns." Both by force of these words, and from the nature of the contract itself, the right of action upon the policy at the death of John R. Wyman vested in his personal representative. It is not easy to see how any one but his administratrix, the present respondent, could have sustained actions on these policies which had been issued to John R. Wyman, for any loss, whether it had occurred before or after his death. It would have been a sufficient answer to any such action by the heirs, upon a policy of insurance, that it was a personal contract to which they were not parties, and that the right of action which it gave

passed upon the death of the original assured to his personal representative, who not only succeeded to all his mere rights of action, but was specifically named in this contract itself.

This, however, is not an action to recover on a policy for a loss; nor is the question between the insurance companies and these parties, or either of them. The companies have indeed, as far as it lay with them, waived any condition in the policies, or any objection to the payment of the loss. The insurance money was paid to David M. Prosser, under a stipulation by which he became in effect a stakeholder, and by which the ultimate disposition of the money is left to the judgment of the courts upon the rights of the parties. The present is an equitable action to ascertain and determine those rights. The plaintiff claims this money as personal property and part of the assets of the estate of John R. Wyman, to which she is not only primarily but absolutely entitled as his administratrix; while the defendants insist that it belongs to them as his heirs-at-law, and the owners of the real estate upon which the building stood which was insured in the policies. It results that although we are not required formally to determine whether an action could have been sustained against the insurance company by either of these parties, yet the controversy between them cannot be determined except by ascertaining their legal or equitable rights to the amount due by the contract of insurance.

I have already intimated the difficulties in the way of an action to recover the insurance money by the heirs. On the other hand, it is said by the heirs that the administratrix could not have sustained such an action, because she had no interest in the property insured. It is unquestionable that the assured must have an insurable interest in the premises covered by the insurance at the time of the loss. But in the present case the title and interest in the lands, and with it the ownership of the building, passed to the heirs; yet, as we have seen, the right of action upon the contract vested in the administratrix. These parties are not strangers to each other, however, but both of them derive title from the intestate by a devolution or transfer, which is not only not forbidden but is recognized by the policy. The policy does not avoid the contract upon the transfer of the title to the property by descent to the heir, and the devolution of the right of action to the administratrix, but expressly preserves the right of action, and continues and extends the privileges of the agreement to the executors and administrators of the assured. An action may be brought upon the contract of insurance by the latter as the successor of the original party, and as named in the instrument itself, to recover damages for the destruction or injury of the interest of the former in the property insured. Thus the contract of insurance by the death of John R. Wyman became by its terms a contract with his administratrix for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The

administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another. She would have been regarded as a party to whom, as a trustee of an express trust, the right to sue in her own name is preserved under the Code, § 118. The case would fall within the decision of *Considerant v. Brisbane*, 22 N. Y. 389. See *Freeman v. Fulton Fire Insurance Company*, 14 Abb. 404.

But it is difficult to reconcile the claim of the respondent to hold this insurance money, as part of the personal assets of the deceased, with this reasoning. The doctrine contended for by the appellant's counsel that not only the right of action, but the beneficial interest in the contract with the insurers, passed to the administratrix at the death of John R. Wyman, fails when it is put to this test. She had no legal estate and no beneficial interest in the premises. The title to the contract, and to a recovery upon it, was vested in her by the operation of law, and not by express assignment or transfer. She is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have the beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract of insurance belongs to the heir and not the personal representative of the deceased. The heir is the absolute owner of the property, entitled to its income and its enjoyment, and damnified by its destruction. He only can bring an action for any damage done to it after the title has passed to him from his ancestor. If the destruction of this building by fire had been the result of the malice or carelessness of another, the heirs of John R. Wyman would have had their action against such person and recovered damages for the very loss against which this contract is an indemnity. They could have destroyed, removed or sold the building at any time, and neither for such an act nor for any injury by a third person, could the administratrix have sued at all. Her rights rest upon the contract of the insurers exclusively; and that is a contract, as I have already said, not of guaranty against the destruction of the property, but of indemnity against a loss to the person injured by such destruction. It follows that it is a contract which, even if made or continued with her, is, in truth, for the benefit of the parties to whom that property belonged. The building which was burned was real estate. As such it vested in the heirs immediately upon the death of the intestate, and its subsequent injury by fire could not convert it into personal estate, so as to divest the right of the heirs or give a new direction or character to the money payable by way of indemnity for their loss. Again, it was a part of the contract of insurance in this case, as is usual in policies of insurance against fire, that upon the destruction or injury of the property the insurers, if they chose, might repair or restore it in specie. If they had elected to take that course the expenditure which would thus have been made would, of course, have been entirely for the benefit of the

heirs. The building repaired or replaced would have been theirs, because standing upon their lands. The theory of the payment of money in lieu of such actual reparation, is that the party is thus enabled to replace what has been destroyed for himself instead of its being done by the insurers. This is very plain in the case of a partial loss where there is only an injury and not a destruction of the premises insured, but it is equally so in all cases. It would be a singular result if the election of the insurers could determine whether the heirs or the administratrix should take the benefits of their contracts; whether they would make compensation in money to the latter, or in kind to the former. And it is a strong implication from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance, inure to those who would, in the case of its literal performance, reap its fruits. My opinion is that in such a case as this the executor or administrator is a trustee for the heir who alone has been damnified, who has sustained the loss, and who is entitled to the indemnity.

It is supposed that such a construction of the contract and of the rights of the parties will be in conflict with the authorities. It is somewhat remarkable that so few cases can be found in which a question of such interest, and which must frequently arise, has been considered. An attentive examination of the few decisions to be found bearing upon the question, will show that they do not really contradict the views which have now been expressed. The difficulties which have been found, and are stated by text writers, grow out of the character of the question, and the peculiar relations of the parties to the subject, rather than from judicial decisions. A leading case, which is much relied on in favor of the right of the personal representative, is *Mildmay v. Folgham*, 3 Ves. 471, in which Lord Chancellor Loughborough makes use of the strong expression, "it is impossible to make the executor a trustee." But that case was decided upon its special circumstances, and cannot be cited to control others which are not in all respects similar. Judith Tucker had insured a house by becoming a member of a company formed by deed for purposes of mutual insurance. She received a policy declaring that certain persons named as trustees would pay to her or her personal representatives, in accordance with the deed, any loss or injury to her property within seven years, and at the end of that time, if no loss occurred, would repay her deposit. The deed provided against survivorship to those remaining, in the event of a death of any person becoming a party to it; and that, in such event, the interest in the deed, and in the association, of a member dying, should survive to his personal representatives, who thereby became members of the company. It was also provided that, if the interest or property in the house insured of any person should expire, inasmuch as the insurance thereby became void, such person could adjust his account and have the deposit repaid him, and that the person succeeding to the property might come in and renew the insurance, becoming a member of the

association in turn. The suit was a bill filed by the heir against the trustees named in the policy: that is, in effect, against the association. The Lord Chancellor held that this was a partnership, or a *quasi* partnership, and that no person could claim its benefits unless he was a member of the society according to its terms, which, he says, were very intelligible and consistent. The effect of the articles in his view evidently was, that the right to their benefits could only survive to the personal representatives, and no one else could succeed to the membership of the original assured. If the interest in the property insured passed to executors, no benefit was taken by the survivors from his death: the interest survived; and the right of membership attached to the representatives by force of the deed of partnership. If, however, the interest in the insured property did not vest in the executor, the only right which remained, according to the deed of insurance, was the right to claim a return of the deposit, which, he says, was with the executor, with whom the account must be made up. The heir or devisee could only come in anew and insure, or become a member of the society on his own account. In other words, the construction put upon the scheme of insurance exhibited by the policy, and the deed of association in that case, was, that by the death of the assured, and the transmission of her interest to a person who was not, and was not entitled to become, by succession, a member of the society, the insurance terminated, and the only rights of the executors and the heirs were a return of the deposit to the one, and a reinsurance by the other. The right of the executors to claim the insurance money upon a loss was not before the court; but the reasoning of the judgment, applied to the facts of the case, is equally fatal to the claim of the executor and of the heir against the company.

There is a case decided by Sir Lancelot Shadwell, Vice-Chancellor, *Parry v. Ashley*, 3 Sim. 97, in which he held that the proceeds of a policy of insurance might be affected with a trust in favor of the parties entitled to the real estate. In that case certain real estate was charged with an annuity, and, subject to that, given to the defendant, who was sole residuary devisee and legatee and also executrix. The buildings were insured, and after the testator's death the executrix renewed the policy. They were burned, and it was held that the insurance money should be regarded as real estate, and preserved for the benefit of the annuitant, and not be disposed of by the executrix as general personal assets.

Haxall v. Shippen, 10 Leigh, 136, is an exceedingly well considered case in the Court of Appeals of Virginia. One Shore died leaving a plantation by will to his widow for life, and remainder to his children. There was an insurance on the buildings, running to him, his heirs and assigns. The widow occupied the house and the policy was kept in force. She married Haxall, and afterwards the buildings were destroyed by fire. A suit in equity was brought upon the policy by Haxall and wife, and a decree made that the insurance money be paid to

them, on their giving bonds to pay the principal to the children and heirs of Shore, at the death of their mother, Mrs. Haxall. The bond was given and the money received, and then used in rebuilding the house. At the death of Mrs. Haxall, suit was brought upon the bond, when the sureties commenced this action to stay its prosecution, on the ground that, by the expenditure of the money in rebuilding, the heirs had already had the benefit of it. The court held that the decree in the first suit, and the action of the parties under it, by giving the bond and receiving the money, was conclusive as to the rights of the parties, and that the subsequent application of the money in rebuilding was voluntary and could not prejudice the heirs. This was all which was necessary to the disposition of the case, although the opinion discusses the rights of the parties, independent of the first suit and judgment. The case was not like the present, as the policy ran to the assured, his heirs and assigns, and was regarded as a covenant real. An adjudication in favor of the heirs could not, therefore, be cited as in point in a case where the policy was a purely personal contract. But, on the other hand, the reasoning of the court is not against the view which we take of the rights of the heirs in such a case. The proceeds of the insurance are, indeed, alleged to be money, and not lands, and not affected with any trust which would defeat creditors and require their use in rebuilding. But, at the same time, they were not considered to have been so entirely converted into personalty as to become the property of others than the owners of the insured property at the time of its destruction. It may be that the judges of that court would have so held in a case like this; but we are not obliged to dissent from their decision, or even to quarrel with their reasoning, as far as they went, in the case before them.

The case of *Carter v. Rockett*, 8 Paige, 437, was between a mortgagee and the owner of property insured; and no question like the present arose. The owner had the entire interest both in the contract and the premises, and the only question was whether a mortgagee had by his mortgage merely a specific lien upon the money due to his mortgagor by the policy, simply because he had a lien upon the land, and because the value of his security was diminished by the destruction of the buildings.

So far as we have thus considered the rights of these parties, and so far as their rights as against each other are concerned, the heirs-at-law are equitably entitled to this fund. If there had been no other allegations or proofs in the case, than such as we have thus far adverted to, the judgment of the Supreme Court would have been erroneous and must have been entirely reversed. The claim of the plaintiff to this fund as part of the ordinary personal assets of the deceased cannot be supported.

But there are other equities which it is necessary to consider. It was alleged and proved that the deceased died largely in debt and probably insolvent, and that the heirs were irresponsible. It was

found by the judge who tried the cause that there was a judgment to a considerable amount against John R. Wyman, which was a lien upon his real estate, and was held by persons not parties to this suit. Although this insurance money is to be treated as proceeds of real estate, it is nevertheless subject, as is the real estate itself, under our laws, to the payment of the debts of the ancestor. A court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors of the deceased to pursue them by the dilatory remedy of a new and distinct proceeding. Having possession of the fund, it is proper to retain it for the purposes of a just administration among the parties entitled to it. It is usual, in cases where the proceeds of real estate come into the hands of the court, and it is shown that there are debts which the real estate was liable to pay, or to be sold in the hands of the heir to satisfy, to order the money paid over to the personal representative, for distribution so far as may be necessary, holding him to account for any balance or resulting residue to the heirs. The direction in the judgment appealed from in this case, that the money in the hands of Mr. Prosser should be paid to the administratrix, in order primarily to the payment of the debts of the deceased, need not therefore in fact be modified, except in a single particular. That particular is one of which the respondent alone in her individual capacity, and not the appellants, can complain. As the widow of John R. Wyman, she is entitled to a dower interest prior to the rights of his creditors in this fund. That should have been preserved by the judgment. It may be that any direction as to the ultimate disposition of the residue, after payment of the debts of the deceased, will be unimportant in this case. But the judgment taken with the complaint and the issue formed upon it by the answer, would imply, if not adjudge, that this money was regarded and ordered to be paid over by the court as part of the general personal estate, and should be distributed and accounted for as such. This was erroneous, and whether the error is of any practical importance to these parties or not, this also should be corrected. No account has indeed been taken of the estate, nor are we in a situation to dismiss the appellants from a right to call for such an account of this fund or of its ultimate disposition. Their right to do so should therefore be preserved. The judgment should be modified so as to provide for the satisfaction of the dower interest of the widow in the moneys in question: for the payment of the surplus to her as the administratrix, to be applied by her in satisfaction of debts entitled to payment out of such assets in the order and manner established by law; and that the residue, if any, be divided among the heirs-at-law of the deceased according to their rights as such heirs. Neither party to have costs of their appeal.

WRIGHT and BALCOM, JJ., dissented; SELDEN, J., did not sit in the case.

Judgment modified, in accordance with above opinion.

NOTE. — As to assets acquired by an executor after his testator's death, see 2 Wms. Exec. (10th ed.) 1279 *et seq.*

NOTE. — APPORTIONMENT. The general rule, both at law and in equity, is that

sums of money, payable periodically at fixed dates, are not apportionable. The most important exception to this rule is with respect to interest on money lent.

Rent is not apportionable in point of time. If A, tenant for life, makes a lease for years to B reserving rent payable at fixed dates, and dies between rent days, no rent for the period from the last rent day to the death of A is due from B, either to the representative of A or to the remainderman. *Clun v. Fisher*, Cro. Jac. 309 (1612); 2 Gray, Cas. on Prop. (2d ed.) 621. But see St. 11 Geo. II, c. 19, § 15; 2 Gray, Cas. on Prop. 625.

If tenant for life, with a power of leasing, makes a lease for years reserving rent payable at fixed dates, and dies between rent days, the remainderman is entitled to the whole of the rent payable on the next rent day. See cases cited in the note to *Ex parte Smyth*, 1 Swanst. 337 (1818).

So also between heir and executor of tenant in fee, *Browne v. Amyot*, 3 Hare, 173 (1844); and cf. *Sohier v. Eldredge*, 103 Mass. 345 (1869).

Annuities are not apportionable. If a sum of money is payable to A during each year of his life and he dies between two dates of payment, his representative is not entitled to any part of the money which would have become due if A had survived to the following date of payment. *Wiggin v. Swett*, 6 Met. 194 (Mass. 1843).

But an annuity payable, by way of maintenance, to infants or *ferme coverts* was apportionable "because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter." *Howell v. Hanforth*, 2 W. Bl. 1016 (1775). And there is authority that an annuity given in lieu of dower is apportionable. *Blight v. Blight*, 51 Pa. 420 (1866). *Mower v. Sanford*, 76 Conn. 504 (1904), *contra*.

The English government has been accustomed to borrow money by issuing its obligations to pay a certain sum each year until such obligation was, at the pleasure of the government, redeemed by the payment of a principal sum. But such principal sum is not demandable by the creditors; the government is only under a redeemable obligation to pay a perpetual annuity. These obligations have been treated by the courts, with respect to apportionment, like annuities to be paid only during a life. Thus if A is entitled to such obligation during his life, remainder to B, and A dies between two dates of payment, B is entitled to the whole of the sum payable on the next date of payment. *Pearly v. Smith*, 3 Atk. 260 (1745); *Sherrard v. Sherrard*, 3 Atk. 502 (1747); *Wilson v. Harman*, 2 Ves. Sr. 672 (1755). See also *Warden v. Ashburner*, 2 DeG. & Sm. 386 (1848).

When a principal sum of money is payable on demand or on a day certain and interest is payable on such principal sum until paid, the interest is conceived to accrue *de die in diem* and therefore to be apportionable. *Banner v. Lowe* (bond of an individual), 13 Ves. 135 (1806); *Re Rogers' Trusts* (debentures of railroad corporations), 1 Dr. & Sm. 338 (1860).

Interest on the bonds of private and municipal corporations was held to be apportionable in *Wilson's Appeal*, 108 Pa. 344 (1885). In *Dexter v. Phillips*, 121 Mass. 178 (1876), the court held that the interest on United States bonds, the principal of which was demandable at a future day certain, was not apportionable. *Sed qu.*

Dividends on the stock of corporations are not apportionable.

If a dividend is declared on the 1st day of January, payable on the 1st day of February, and A, entitled to such stock during his life, dies between such dates, his representative is entitled to the whole dividend. *Wright v. Tuckett*, 1 J. & H. 286 (1860).

If a dividend is declared on the 1st day of January, payable on the 1st day of February to stockholders of record on the 15th day of January, and A dies between the 1st and the 15th of January, *semble* that B, entitled to the stock upon the expiration of A's life interest, would be entitled to the whole of the dividend. See *Burroughs v. N. C. R. R. Co.*, 67 N. C. 376 (1872).

If a dividend is declared after A's death, the whole dividend goes to B, even though the dividend is declared out of profits made before A's death. *Bates v. MacKinley*, 31 Beav. 280 (1862).

Dividends declared by savings-banks were held not to be apportionable in *Greene v. Huntington*, 73 Conn. 106 (1900).

As to extra dividends, see *DeKoven v. Alsop*, 205 Ill. 309 (1903) and cases cited.

There are important statutory enactments both in England and the United States which make apportionable sums of money which at the common law are unapportionable.

D. *Rights ex Delicto.*

ST. 4 EDW. III. (1330) c. 7. Item, Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; (2) it is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had if they were in life.¹

EMERSON v. EMERSON.

KING'S BENCH. 1672.

[Reported 1 Vent. 187.]

TRIN. ULT. ROT. 1389. Error of a judgment in the Common Pleas, in an action of trespass by the plaintiff as executor, upon the Statute of 4 E. III. *De bonis asportatis in vita testatoris*. The plaintiff declared, that the defendant *blada crescentia* upon the freehold of the testator, *messuit, defulcavit, cepit, et asportavit*.

Upon not guilty pleaded, a verdict and judgment was for the plaintiff, and assigned for error, that no action lay for cutting of the corn; for that is a trespass done to the freehold of the testator, for which the Statute gives the executor no action, and while the corn stands, 't is to many purposes parcel of the freehold. So that if a man cuts corn and carries it away presently, though with a felonious intent, 't is no felony: otherwise, if he let it lie after 't is cut, and at another time comes and steals it. So that it appears for parcel of the trespass no action lies; then entire damages being given as well for the cutting, as carrying away of the corn, the judgment is erroneous.

But all the Court were of another opinion; for 't is but one entire trespass; the declaration only describes the manner of taking it away.

¹ In *Smith v. Colgay*, Cro. El. 384 (1595), an administrator was, on "the equity of the statute," allowed to maintain trespass *de bonis asportatis, in vita intestati*. So in *Ruland v. Ruland*, Cro. El. 377 (1595), executors of an executor were allowed to maintain trover for the conversion of the testator's goods. In *Le Mason v. Dixon*, W. Jones, 173 (1628), the Court of King's Bench were equally divided on the question whether an action against a bailiff for suffering an escape of one held on mesne process survived to the executor under the Statute. DODERIDGE and WHITLOCK, JJ., were of opinion that the action lay for that the Statute "*est prise largement per equity*." HYDE, C. J., and JONES, J., thought that the "Statute gives remedy of goods and chattels only, and not for any other trespass, as assault and battery, slander, deceit, false imprisonment *et similia*." The case was left undetermined. But in *Williams v. Carey*, 1 Salk. 12 (1695), an executor was allowed to maintain an action on the case against a sheriff for a false return to a levy of execution made under a judgment recovered by the testator, which judgment the debtor after such false return became unable to satisfy. And see *Paine v. Ulmer*, 7 Mass. 317 (1811).

Indeed, if it had been *quare clausum fregit et blada asportavit*, it had been naught; or if he had cut the corn and let it lie, no action would have lain for the executor. So if the grass of the testator be cut, and carried away at the same time; because the grass is part of the freehold, but corn growing is a chattel. The Statute of 4 Ed. III. hath been always expounded largely.¹

BERWICK v. ANDREWS.

QUEEN'S BENCH. 1703.

[Reported 1 Salk. 814.]

JUDGMENT was obtained against J. S. as executor, and now the executor of him that obtained the judgment brought an action of debt upon that judgment against the said J. S., suggesting a *devastavit* in the lifetime of his testator, and had judgment by *nihil dicit* in C. B. And now error being brought it was objected, that the plaintiff was not privy to the judgment, and therefore ought first to have brought his *scire facias*, and then have suggested a *devastavit* according to the case of *Wheatly and Land*, 1 Saund. 216, and that this was carrying *devastavit* a step farther than they had yet gone. SED PER CUR. It lies for the executor of him to whom the wrong was done, though it lies not against the executor of him that did the wrong.² Here the defendant is the person against whom the recovery was, and he has admitted assets; and the executor may as well maintain this action, as he may an action of debt for an escape where his testator might. So an executor of a parson shall maintain debt for tithes, as the testator might: for in this case the tort was to the property of the testator, and vested an interest in him, and is within the equity of the Statute *De Bonis Asportatis*; and the same reason holds for an action of debt, as for a *scire facias*. Vide 2 Sid. 102.³

PULLING v. GREAT EASTERN RAILWAY COMPANY.

QUEEN'S BENCH DIVISION. 1882.

[Reported 9 Q. B. D. 110.]

STATEMENT OF CLAIM was in substance as follows:—

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime. By an order of the court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway was, by and through the negligence of the defendants in and about the working of the defendants'

¹ Cf. *Williams v. Breedon*, 1 B. & P. 329 (1798). See St. 8 & 4 Wm. IV. c. 42, § 2 (1833).

² But see 30 Car. II. c. 7 (1678); 4 & 5 Wm. & M. c. 24, § 12 (1693).

³ s. c. 2 Ld. Raym. 971.

railway and the management of an engine of the defendants, knocked down and run over by the engine, and sustained personal injuries. It was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented from the time when he was so injured until his death from following his occupation, and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

Demurrer.

Lush Wilson, for the defendants, in support of the demurrer, was stopped by the court.

Clay, for the plaintiff, in support of the statement of claim.

DENMAN, J. I think that our judgment must be in favor of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim *Actio personalis moritur cum persona*. To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw v. Lancashire and Yorkshire Ry. Co.*, Law Rep. 10 C. P. 189, certainly does not go to that length, because the judgments in that case are expressly based upon the distinction in this respect between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract. The case of *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599, was decided upon the same principle as *Bradshaw v. Lancashire and Yorkshire Ry. Co.*, though Quain, J., expressly dissented from the decision in that case so far as his personal judgment was concerned, and Mellor, J., did not express any approval of it, but considered himself bound by it as an authority. There was not anything said in the judgments in *Leggott v. Great Northern Ry. Co.* to warrant our going to the length to which we should be going if in the present case we held that the maxim *Actio personalis moritur cum persona* did not apply. The duty, for breach

of which the action was brought in that case, arose out of a contract, and the action was in substance for breach of contract to use due care towards the passenger whilst waiting for his train on the platform. Some of the expressions used by the judges in the case of *Trycross v. Grant*, 4 C. P. D. 40, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason of the failure to perform the statutory obligation to disclose certain contracts. The present is an altogether different case. Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

POLLOCK, B., concurred.

Judgment for the defendants.

CUTTING v. TOWER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1859.

[*Reported 14 Gray, 183.*]

ACTION of tort for fraud and deceit in selling to the plaintiff's intestate eight bushels of damaged and poisoned corn meal, which caused the death of the intestate's horses when given to them as food.

At the trial in the Superior Court of Suffolk at March Term, 1858, the defendants objected that this action did not by law survive to the plaintiff. *Huntington, J.*, overruled the objection, the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. G. Abbott and F. A. Brooks, for the defendants.

M. G. Cobb, for the plaintiff.

BIGELOW, J. This case falls within the general rule that actions of tort do not survive. The exception created by the Rev. Sts. c. 93, § 7, that actions for damage done to real or personal estate shall survive, was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party, and not where it results incidentally or collaterally therefrom, or from the doing of some other act, or the happening of some subsequent event over which the wrongdoer has no control. The gist of the action in the present case is the fraud and deceit practised by the defendants on the plaintiff's intestate in the sale of merchandise. For this an action to recover damages would have laid in his favor whether the meal which he pur-

chased had ever been used or not. It was not therefore the fraudulent representation of the defendants, which operated directly to the injury of any personal property. It was the use to which the meal was put, that caused the damage for which the plaintiff now seeks to recover. But that was not the act of the defendants. It was only a pecuniary loss resulting incidentally from the sale of the meal. Suppose the meal, instead of being used by the plaintiff's intestate to feed his horses, had been made into bread for his family, and caused great sickness and suffering and loss of time to him and others. It would hardly be said that an action in such case would survive under St. 1842, c. 89, for damage to the person. The provisions of the Statutes allowing actions of tort to survive have been strictly construed, so as not to extend the exceptions beyond the clear intent of the Legislature. *Read v. Hatch*, 19 Pick. 47; *Nettleton v. Dinehart*, 5 Cush. 543.

Exceptions sustained.

JENKS v. HOAG.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[*Reported 179 Mass. 583.*]

TORT to recover damages for an alleged conspiracy of the defendant, an attorney at law, with his client under examination as a poor debtor, to prevent, by false testimony of the client, the plaintiff's intestate from obtaining an order for the application of certain money of the client in satisfaction of an execution held by the plaintiff's intestate against her. Writ dated March 17, 1900.

The plaintiff's declaration alleged in substance, that the plaintiff's intestate recovered a judgment against Charles W. Shaw and Jennie G. Shaw; that execution thereon was duly issued and demand made upon the judgment debtors for payment, which was refused; that thereafter Jennie G. Shaw was cited to appear and submit to an examination regarding her property; that she appeared and that the defendant acted as her attorney; that at the beginning of the examination she owned a half interest in a certain partnership, which half interest was worth \$300 and was more than sufficient to satisfy the judgment; that during the progress of the examination she sold her interest in the partnership and received therefor \$300, which was not exempt from execution; that the defendant, with full knowledge of the premises, conspired with the above named Jennie G. and Charles W. Shaw to conceal this property and to deceive the court as to the judgment debtor's condition; that Jennie G. Shaw in the presence of the defendant, and with his knowledge and assent, in answer to interrogatories submitted to her during the examination, stated that she had no property not exempt from execution except the partnership interest, which was of little or no value; that the defendant with knowledge of the sale of the part-

nership interest and the amount of money obtained therefor, presented a statement to the court, signed by Jennie G. Shaw and sworn to before the defendant as a justice of the peace, to the effect that only \$40 had been realized from the sale of the partnership interest, which money had all been expended; that by reason of this conspiracy and the acts of the defendant the court was deceived and induced to believe that Jennie G. Shaw had no property not exempted from execution, and withheld its order requiring her to produce sufficient of her money to satisfy the judgment of the plaintiff's intestate, whereby the judgment was rendered worthless.

The defendant demurred to the declaration and also answered. The plaintiff demurred to the defendant's answer and also replied.

In the Superior Court, *Aiken, J.*, sustained the demurrer to the declaration and gave judgment for the defendant; and the plaintiff appealed.

J. L. Rice, for the plaintiff.

C. E. Hoag & S. S. Taft, for the defendant.

KNOWLTON, J. This case is before us on the plaintiff's appeal from an order sustaining the defendant's demurrer, and directing a judgment for the defendant. A question much discussed by the parties is whether the averments of the declaration state a case of damage directly resulting from the defendant's wrong, which can be the foundation of a judgment in an action of tort. The allegations of the declaration virtually charge the defendant with subornation of perjury. He is accused of having conspired with his client to present false testimony which should prevent the plaintiff's intestate from obtaining an order for the payment to him of a sum of money. The defendant contends that this case is governed by the decisions in many cases which hold that no action lies for conspiring with a debtor to fraudulently dispose of his property to keep it away from his creditors. See *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145; *Bradley v. Fuller*, 118 Mass. 239; *Adler v. Fenton*, 24 How. 407; *Austin v. Barrows*, 41 Conn. 287; *Klous v. Hennessey*, 13 R. I. 332; *Moody v. Burton*, 27 Maine, 427; *Hall v. Eaton*, 25 Vt. 458.

None of these cases is identical with the present case, and it is unnecessary to determine whether the principles established by them are so far applicable to the facts set out in the declaration as to be decisive of the question. We are of opinion that the demurrer was rightly sustained on another ground. This action is brought by the administrator of the original judgment creditor to whom the wrong is alleged to have been done. It is a general rule that actions of tort do not survive. Pub. Sts. c. 165, § 1. The statute creates certain exceptions to this rule, of which the only one necessary to be considered is that referring to actions "for damage done to real or personal estate." The plaintiff contends that this case falls within this exception, and argues that the suit is brought to recover for damage done to the judgment, which is personal estate.

It has been decided repeatedly that "a mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate." *Leggate v. Moulton*, 115 Mass. 552, and cases there cited. See also *Cutter v. Hamlen*, 147 Mass. 471. The statute was intended to give a remedy which should survive only for injuries of a specific character "to real or personal estate." In the case last cited there was no damage done to the plaintiff's real or personal estate, and in the present case there was no damage done to the judgment, considered as a specific part of the property of the plaintiff's intestate. The judgment was entirely unaffected by the defendant's alleged wrong. The wrong was not directed towards the judgment itself. At the most, it merely rendered ineffectual one of the methods by which the creditor hoped to collect the judgment. It seems to us plain, therefore, that the case does not fall within this exception, and that the entry must be,

*Judgment affirmed.*¹

NOTE. — ADMINISTRATOR DE BONIS NON. On the death of an executor or administrator, the administrator *de bonis non* takes all the legal personal assets (see note on assets, p. 557, *post*) existing as assets at the death of the original executor or administrator, but he does not take any property which has ceased to be assets.

All the chattels, real and personal, of the deceased, and all his surviving choses in action or claims in equity to money or other personal property are assets.

If any assets have been disposed of by the executor, *e. g.* in paying debts, they cease to be assets.

If the assets have been wrongfully transferred by an executor to one having notice, the administrator *de bonis non* may maintain a bill to have them conveyed to himself. *Cubbridge v. Boatwright*, 1 Russ. 549 (1826).

If the executor, in lieu of assets, takes a bond to himself as executor, that is a conversion of the assets to himself; the bond is not assets, and on his death it passes to his own administrator, and not to the administrator *de bonis non*. *Hosier v. Arundell*, 3 B. & P. 7 (1802). See *Armitage v. Metcalf*, 1 Ch. Cas. 74 (1866); *Miller's Case*, Freem. K. B. 283, 284 (1674). Cf. *Caulkins v. Bolton*, 98 N. Y. 511 (1885). But see *Bogert v. Hertell*, 4 Hill, 492 (1842).

But a promissory note taken by executors in payment for goods of the testator is, in England, deemed assets. *Partridge v. Court*, 5 Price, 412 (1818); affirmed (in Cam. Scacc.) 7 Price, 591 (1819). *Catherwood v. Chabaud*, 1 B. & C. 150 (1823).

So if an executor makes an underlease of a leasehold, the reversion remains assets, although perhaps the right to sue for a rent received may be personal to him. See *Turner v. Hardey*, 9 M. & W. 770, 773 (1842); *Drue v. Baylie*, Freem. K. B. 402 (1675). And although in *Skeffington v. Whitehurst*, 3 Y. & C. 1 (1838), it was held that the right to redeem a mortgage of leaseholds made by an executor, passed to his representative, and not to the administrator *de bonis non*, this was disapproved on the appeal in the House of Lords. *Skeffington v. Budd*, 9 Cl. & F. 219, 248 (1842).

If any of the goods or choses in action have been disposed of or collected by the executor or administrator, the proceeds are assets so long as they remain in the hands of third persons. *Langford v. Muhony*, 4 Dr. & W. 81, 107 (1843). And if a note taken by an executor is assets, it would seem that money taken by him would be assets also, whether it be retained in specie, or whether it be deposited with a banker in a separate account. See *Goods of Hall*, 1 Hag. Ecc. 139 (1827).

But the Supreme Court of the United States has held that the administrator *de bonis non* cannot recover from an agent of the executor a debt of the deceased collected by such agent. *Wilson v. Arrick*, 112 U. S. 83 (1884). See *Beull v. New Mexico*, 16 Wall.

¹ See *McClure v. Miller*, 4 Hawks, 138 (N. C. 1825); *Wolf v. Wall*, 40 Oh. St. 111 (1888).

535 (1872); *U. S. v. Walker*, 109 U. S. 258 (1883). And the Supreme Court of Pennsylvania has held that the administrator *de bonis non* cannot demand from a bank the moneys which the original administrator deposited to his account as administrator. *Slaymaker v. Farmers' Bank*, 103 Pa. 616 (1883); *Sibbs v. Philadelphia Saving Fund Society*, 153 Pa. 345 (1893). See *Potts v. Smith*, 3 Rawle, 361 (1832).

See also *Yaites v. Gough*, Yelv. 33 (1603); *Hirst v. Smith*, 7 T. R. 182 (1797).

In many of the United States the powers of administrators *de bonis non* are extended. See 2 Woerner, Amer. Law Adm. (2d ed.) §§ 351, 352.

At common law the claim on a *devastavit* did not survive against the executor or administrator of an executor or administrator, but a remedy was given by Sts. 30 Car. II. c. 7 (1678); 4 & 5 Wm. & M. c. 24 § 12 (1693). See *Tucke's Case*, 3 Leon. 241, *post*.

SECTION III.

ALIENATION.

ANONYMOUS.

1536.

[Reported *Dyer*, 28 b, pl. 146.]

KNIGHTLEY asked this question: If two executors have a term, and one grants to a stranger all that belongs to him, how much of the term shall pass? And the COURT thought, that all the whole term passed, inasmuch as each of them has an entire authority and interest in the term, as executor; but of other joint-tenants of a term it is otherwise: so there is a diversity.

NOTE.—In *Hudson v. Hudson*, 1 Atk. 460 (1737), there is a dictum of LORD HARDWICKE, C., “that one administrator cannot release a debt, or convey an interest, so as to bind the other, and that the case of an administrator differs from that of an executor.” But in *Jacomb v. Harwood*, 2 Ves. Sr. 265, 267, 268 (1751), SIR JOHN STRANGE, M. R., said that in *Willand v. Fenn* the Court of King’s Bench, after three arguments, held “that one administrator stood on the same ground and foundation with one executor.” (See, however, 1 Selwyn, N. P. (13th ed.) 692, note v.). In *Smith v. Everett*, 27 Beav. 446, 454 (1859), SIR JOHN ROMILLY, M. R., said that, though a question had been raised as to whether one of several administrators had the same power as one of several executors, he apprehended that such question was “now settled,” and that there was no difference between executors and administrators in this respect. See 1 Wms. Exec. (10th ed.) 720. It was, however, held in *Jordan v. Spiers*, 113 N. C. 344 (1893), that one of two administrators had not power to compromise a debt due the intestate. The court said, page 347: “It is in order to divide responsibility and multiply counsellors that the Clerk is empowered in his discretion to give letters of administration to one or more of the next of kin. Such precaution on his part is in vain, if either the widow or the next of kin can compromise all of the solvent credits and dispose of all of the choses in possession without consulting

the other . . . A testator is supposed to repose a special trust and confidence in every person named by him as executor, but the object of our statute is to give the power to the Clerk to utilize the combined wisdom of two or more agents in the management of fiduciary matters under his supervision." Cf. 2 Woerner, Amer. Law Adm. (2d ed.) § 346.

"One co-executor may release a debt, and do other acts, without his companion, and he may therefore assent to a bequest to himself." So held by the Court of King's Bench, in *Townson v. Tickell*, 3 B. & Ald. 81, 40 (1819). See *Cole v. Miles*, 10 Hare, 179 (1852).

One executor, however, as such, cannot bind his co-executors by a contract. See *Turner v. Hardey*, 9 M. & W. 770 (1842).

THOMLINSON v. SMITH.

CHANCERY. 1678.

[Reported Finch, 373.]

WILLIAM ADAMS the father of the plaintiffs Mary, Anne, and Joan, being possessed of a term for years of an inn called the Black Horse Inn, situate in St. Thomas Street in Bristol, did about the year 1654, by his last will devise the same to his son Roger Adams for ten years after the decease of his wife, or change of her widowhood, and after the expiration of the said ten years, then he devised the residue of the said term to his said 3 daughters Mary, Anne, and Joan, equally to be divided amongst them; or to such of them as should be then living, and made his wife Anne sole executrix, *who assented to the said legacies*, and entered and enjoyed the premises during her life; and died about 12 years since, about which time there was 18 years of the said term to come and unexpired.

After the death of the said Anne, the defendant Richard Smith purchased the interest of the said Roger in this inn, having before purchased the *inheritance*; and after the said ten years were expired, the plaintiffs entered as devisees by the said last will of their father William Adams, and exhibited a bill to have an account, &c., and that the remainder of the said term might be decreed to them.

But the defendant refused to give them possession, claiming the premises by virtue of an *assignment* of the said term to him by Anne *the executrix* of William Adams, in consideration of £150 which he paid to her, the better to enable her to discharge the debts of the said testator, *she not having sufficient assets* for that purpose; and thereupon she delivered up to the said defendant Smith *the original lease*; and that since he entered, he hath laid out several sums of money in the necessary repairing the said inn.

And that since the plaintiffs have charged, that the said Anne *the executrix did assent to their legacies*, they have a proper remedy at law notwithstanding the said *assignment*; and therefore he insisted by his counsel. that they ought not to have any relief in this court.

But the court being satisfied, that the said Wm. Adams left sufficient assets to pay his debts; and that Anne *the executrix did assent to the said legacies*, decreed to the plaintiffs the residue of the said term; and that the defendant should account to them for the rents and profits over and above the rent reserved in the original lease, from the expiration of the 10 years, during the remainder of the said term, according to the value thereof, when the defendant first entered, in case the plaintiffs will accept it.

But if the plaintiffs shall insist to have the account taken according to the present value, then the master to take an account of what money the defendant hath laid out for the necessary repairs and improving the premises; and in taking the said account he is to have respect as well to the interest of the said Anne, and to the term of 10 years which Roger had in the same, as to the plaintiff's interest, and also to the inheritance; and to allow the defendant proportionable shares of all such money by him laid out in repairs and improvement of the rent, out of the money that shall be coming to the plaintiffs.

But if the plaintiffs will accept the account according to the value of the said inn, at the time when the defendant entered, then the master is only to examine what that value was, and accordingly to take the account, and to certify what will be thereupon due to the plaintiffs, &c.¹

HUMBLE v. BILL.

CHANCERY. 1703.

[*Reported 2 Vern. 444.*]

BILL having a term for twenty-one years in the printing-office, devised (amongst other things) that £2,000 should be raised out of the profits of the printing-office for his daughter, the wife of Darcy Savage, and their children, and made one Garret executor; who first mortgaged the term in the printing-office to Dr. Brown, and the same was afterwards assigned to Sir William Humble for £1,800.

It was insisted, here was no occasion to sell to pay debts, and Sir William having notice of the will, was to take the estate subject unto the £2,000.

But the court was of opinion, that the executor of a testamentary estate had the power over it so as to alien or sell, as he should judge necessary; and that if he sold in prejudice of a residuary or specific legatee, they might have their remedy against the executor, but not follow the estate into the hands of a purchaser; for should that be

¹ In *Williams v. Lee*, 3 Atk. 223 (1745), it was held that where the executor had assented to a specific legacy and then delayed in delivering it, the legatee might maintain trover against the executor. See also *Whorton v. Moragne*, 62 Ala. 201, 206 (1878); 1 Wms. Exec. (10th ed.) 701 note (h).

allowed, no one would venture to buy of an executor; for it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets; nor is he entitled to have the vouchers to make out such an account; and if such difficulties be put upon purchasers of chattels, &c., from executors, it will follow, that executors will be under an incapacity, and disabled to sell, though there be never so much occasion for it, for payment of debts; and therefore the court decreed an account to the plaintiff of the rents and profits, and to hold and enjoy the printing-office, and defendants to redeem, or be foreclosed.

NOTE. — This decree was afterwards reversed upon an appeal to the House of Lords (1 Bro. P. C. 71).¹

CRANE v. DRAKE.

CHANCERY. 1708.

[Reported 2 Vern. 616.]

FRANCIS HOOPER, being indebted to the plaintiff £100 on bond, died possessed of a great personal estate, and made his brother William executor and devisee, who wasted the estate: the defendant Drake, having notice of the plaintiff's debt, buys of William, the executor, a leasehold estate by discounting £200 due from the testator, £550 due from the executor, and by payment of £150 in money.

Plaintiff's bill was to have satisfaction for his debt out of the leasehold estate, being part of the testator's assets.

Question was, whether this was a good sale to bind a creditor.

For the defendant it was insisted, that an executor may sell, and with the money, when he has it, may pay his own debts; and for the same reason he may upon sale discount and allow the purchaser the debt he owes him; and the rather in this case, because he paid £150 in money with which the executor might have paid the plaintiff's debt; yet decreed for the plaintiff at the Rolls. and affirmed on an appeal to

¹ "I should have hardly assented to the reversal. *Ever v. Corbet*, 2 Wms. 148: The Master of the Rolls seems to think that case has gone too far: it is not a very clear case, but it appears there had been bills filed in chancery concerning it, and that there was a bill depending, when Sir William Humble advanced his money. Garrat, the executor, had been decreed to transfer his trust, so that he was under a decree to transfer, when he mortgaged to Brown, and afterwards to Humble; Mrs. Savage afterwards got another decree. If these were the grounds on which the House of Lords proceeded, I must dissent from their judgment. This was not the common case of an executor mortgaging the property of the testator, which might or might not be for the purposes of the will. There was no lawyer at that time in the House (unless perhaps Lord Somers), and the case was much embarrassed by circumstances." — *Per* SIR RICHARD PEPPER ARDEN, in *Andrew v. Wrigley*, 4 Bro. C. C. 125, 137 (1792).

Cf. McLeod v. Drummond, 17 Ves. 152, 160, 161 (1810).

the Lord Chancellor, he saying the defendant was a party, and consenting to and contriving a *devastavit*.¹

EWER v. CORBET.

CHANCERY. 1723.

[*Reported 2 P. Wms. 148.*]

ONE possessed of a term of years, devised it to A. and died indebted, having made B. his executor.

The executor sold the term, upon which the devisee of the term brought a bill against the purchaser, insisting, that the term being devised to the plaintiff, the executor was but a trustee for him, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust.

MASTER OF THE ROLLS. [SIR JOSEPH JEKYLL.] I remember it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of major *Bill v. Humble*, 2 Vern. 444.

But since that, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy, but against the executor, to recover the value thereof, if there be sufficient assets for the payment of debts.

As for the notice of the will, and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice, so that if notice were to be an hindrance, then of consequence, no executor might sell.

It is not reasonable to put every purchaser of a lease from an executor, to take an account of the testator's debts; nor has he any means to discover them.

On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (*inter alia*) of necessity be liable, and therefore may be sold by the executor.

If equity were otherwise, it would be a great hindrance to the payment of debts and legacies; and would lay an embargo upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences.

I admit, if an executor should sell a term for an undervalue, or to one who has notice that there are no debts, or that all the debts are paid, this might be another consideration: but there being no such ingredient in the present case,

Dismiss the bill.²

¹ See *Doe d. Woodhead v. Fallows*, 2 C. & J. 481 (1832).

Assets in the hands of an executor are not bound by issue of an execution against the executor personally. *Farr v. Newman*, 4 T. R. 621 (1792). See *Quick v. Staines*, 1 B. & P. 293 (1798); *M'Leod v. Drummond*, 17 Ves. 152, 168, 169 (1810); *Ray v. Raj*, Coop. 264 (1815); *Gaskell v. Marshall*, 1 Mood. & R. 132 (1831); *Smith v. Ayer*, 101 U. S. 320, 327 (1879).

² See *Cole v. Miles*, 10 Hare. 179 (1852).

NUGENT v. GIFFORD.

CHANCERY. 1738.

[Reported 1 Atk. 463.]

THE bill was brought against some of the defendants, as trustees of a mortgage term for an assignment, and against others to discover what interest they had in the premises.

It appeared that the mortgage in question, was a mortgage term to trustees in trust for Sir Richard Billings the testator, and Mr. Arundel executor of Sir Richard had assigned this mortgage term to the plaintiff, as a satisfaction for a debt due from Mr. Arundel to the plaintiff.

The question was, if such assignment was good against the daughters of Sir Richard Billings, who were creditors under the marriage settlement, and also to whom the trustees should assign the legal estate.

LOKD CHANCELLOR [HARDWICKE]. The question is, if the two daughters, who are allowed to be creditors, are entitled to follow this mortgage term (in the hands of the plaintiff as assignee of it) as specific assets.

I am of opinion they are not, but that the plaintiff is entitled to the benefit of such assignment by the executor.

At law the executor has a power to dispose of, and alien the assets of the testator, and when they are aliened, no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands, but no lien on the assets: this court will indeed follow assets upon voluntary alienations by collusion of the executor; but if the alienation is for a *valuable consideration*, unless fraud is proved, this court suffers it as well as at law, and will not control it; for a purchaser from an executor, has no power of knowing the debts of the testator; and if this court, upon the appearance of debts afterwards, would control such purchasers, nobody would venture to deal with executors.

It is objected first, that these were the equitable assets of Sir Richard Billings, and that the plaintiff purchased nothing but an equitable interest, burdened with all the equity in the hands of the person from whom he purchased.

But that is a rule only where there is a lien on the thing itself, and I know no difference in this court, between the power of an executor to dispose of equitable and legal assets.

The second objection is, that the assignee took this assignment with notice, that it was the testamentary assets of Sir Richard Billings.

But if this was sufficient to affect it, it would affect every purchase from an executor, because every such purchaser must have such notice.

The third objection is, that this is a *devastavit*, because the consideration was a debt of the executor's own.

But I know no rule in this court to warrant *that*, neither is there any difference between this and money paid down, provided it be done

bona fide, a sum of money *bona fide* due, is as good and valuable a consideration as any.

The only authorities relied on are *Crane v. Drake*, 2 Vern. 616, and *Paget v. Hoskins*, Prec. in Eq. 431. The first greatly differs from the present case, there being express notice of a debt from the testator, still unsatisfied, and a contrivance between the purchaser and the executor, to defeat a just debt, and as Lord Chancellor said, the defendant was a party to, and contriving a *devastavit*.

Here was no notice of any debts due from the testator, for it is sworn in the answer, that Sir Richard Billings died worth £40,000, and this was a debt under a settlement, which is a private transaction in the family.

As to the case of *Paget v. Hoskins*, that was a gross sum computed by the wife as her share of her former husband's estate, according to the custom of London, and taken by the husband, subject to that account.

These are the only authorities. and both different from the present case; this I think therefore is a good alienation, and the plaintiff ought to have the benefit of it.¹

WHALE v. BOOTH.

KING'S BENCH. 1785.

[Reported 4 T. R. 625, *note*.]

ACTION against the sheriff for a false return. Verdict for the plaintiff, damages £35 at all events, and a farther verdict for £368, subject to the opinion of the court on a case reserved.

William Woodham in his lifetime, and at the time of his death, was indebted by bond to the plaintiff in the penal sum of £800, conditioned for the payment of £400 with interest. William Woodham died three years ago, leaving his two sons, William and John, his executors, who on his death possessed themselves of the stock on his farm, and other personal effects to a much greater amount than the money due on the bond. The plaintiff obtained judgment for the said sum, and £35 for costs. On a *fi. fa.* sued out, the sheriff returned *nulla bona*. It appeared in evidence that the executors were indebted to their uncle to the amount of £800, and confessed judgment; upon which a *fi. fa.* issued; and goods were levied both of the testator and of the executors

¹ *Nugent v. Gifford* "was a term vested in trustees for Sir Richard Billings and his wife. Sir Richard Billings, by his will, gave several specific legacies, and made Mr. Arundel, his natural son, executor and residuary legatee. In 1718, two years after Sir Richard's death, the son had become indebted to Knight, one of the trustees of the term. He assigned to Knight the term, inasmuch as he could, as executor, and there was an account settled between them: there was no bill for an account against

for satisfaction of that judgment. The case stated that the uncle knew the goods levied were the goods of the testator. The question was, whether under the circumstances of this case, the executors had so far conveyed away the goods of the testator as to deprive the plaintiff of levying her debt upon the said goods.

After argument by *Bond* for the plaintiff, and *Garrow* for the defendant,

LORD MANSFIELD, C. J., said, The general rule, both of law and equity, is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It would be monstrous, if it were otherwise; for then no one would deal with an executor. He must sell in order to effect the will; but who would buy if liable to be called to an account? It is also clear, that if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud; for all the testator's debts may have been already satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception indeed, where a contrivance appears between the purchaser and executor to make a *devastavit*. But nothing of that sort appears here; for the alienation is by execution and a bill of sale. The testator died three years before this transaction; and if the executors paid all demands, the assets belong to them. No demand was made by the plaintiff during all that time; and long before any demand was made, a fair creditor of their own sued out execution. As to fraud, there is none. It is stated, indeed, they knew the goods were the goods of the testator; but that will not make a fraud, as it is not stated that they knew the debts were unpaid. It is true that the executors might have disputed the seizing of the goods which he had as executor; but they did not object. On the contrary, by being a party to the bill of sale, they assented to it; and this bill of sale, so assented to, is equal to a purchase; and is the same as an alienation by the executors.

WILLES and ASHHURST, Justices, concurred.

BULLER, J. The case of *Gifford and Nugent* is not unapposite to the present. What is it that constitutes a *devastavit*? Not merely that they knew the goods so disposed of were assets, but that they also knew that there were debts unpaid.

Judgment for the defendant.

Arundel. It was not incumbent upon a purchaser from an executor and residuary legatee, to inquire whether the debts were paid. That case may be rightly determined." — *Per* SIR RICHARD PEPPER ARDEN, M. R., in *Andrew v. Wrigley*, 4 Bro. C. C. 125, 136 (1792).

"That case, therefore, was decided not upon such general doctrine as we find, relating to this subject, but on these circumstances: that the executor, being also residuary legatee, sold the term to an individual having no notice that there was any debt; who therefore might reasonably conceive that the fund was his to dispose of." — *Per* LORD ELDON, C., in *McLeod v. Drummond*, 17 Ves. 152, 164 (1810).

See the case of *Mead v. Orrery*, 3 Atk. 235 (1745), and the comments upon it in *Andrew v. Wrigley*, 4 Bro. C. C. 125, 136 (1792), and *McLeod v. Drummond*, 17 Ves. 152, 164 (1810).

HILL v. SIMPSON.

CHANCERY. 1802.

[*Reported 7 Ves. 152.*]

JOHN SMITH by his will, dated the 18th of January, 1785, among other legacies, gave to Jane Pearson the sum of £200 to be paid to her immediately, or as soon as possible on the death or marriage of his wife Elizabeth Smith; and he left Charles Rushworth £50, to be paid at the death of his said wife; and he appointed John Lush and his said wife Elizabeth Smith, executors. The testator died on the 23d of May, 1785; and his widow and Lush proved the will. Lush died on the 26th of January, 1796; and on his death, Elizabeth Smith possessed herself of all the personal estate of her late husband.

Elizabeth Smith by her will, made in 1790, directed all her debts, funeral expenses, and the expenses of the executors, to be paid; and, subject thereto and to her late husband's will, she gave, devised, and bequeathed, all and every the moneys, real and personal estates, securities for money, goods, chattels, and all other her estate and effects, to her nephews Joseph Simpson, William Thorley, and Henry Wright, and to the survivors and survivor of them, their and his executors and administrators; upon trust to convey the freehold property, consisting of two messuages, to her two nephews John Simpson and James Simpson; with remainder over to Joseph Simpson; and after giving some legacies she appointed Joseph Simpson, Thorley, and Wright, her executors.

Elizabeth Smith died on the 5th of April, 1797; leaving Joseph Simpson her heir at law; who alone proved her will; and possessed himself of her real and personal estates, and of part of the personal estate of John Smith. At her death there were standing in the name of John Smith in the books of the Bank of England £50 Five per cent Navy Annuities; £275 Four per cent Consolidated Annuities; £60 Short Annuities; and £550 Three per cent Reduced Annuities; which funds Simpson transferred to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. In 1798 a commission of bankruptcy issued against him.

Thomas Hill married Jane Pearson; and they and Rushworth, who was then an infant, filed the bill against Simpson and Wright, Thorley being dead, and against the assignees and the bankers; praying, that it may be declared, that the funds transferred by Simpson to the bankers are liable to the legacies of the plaintiffs, &c.

The defendants Moffatt & Co. by their answer stated, that about February, 1794, the defendant Simpson opened an account with them as bankers; which continued till his bankruptcy; in the course of which he drew a great number of bills on them; and was always or for the most part in their debt on the balance of such account; for which they repeatedly pressed him; and frequently refused to accept

and pay his bills, until he remitted money to discharge or lessen such balance; and informed him, they would not continue such account; unless he made remittances to answer his bills. On the 11th of May, 1797, he was indebted to them £399 18s. 5d. besides other bills, which they had accepted for him, not then due; and he called upon them; and represented, that he was under the necessity of providing a very large sum of money immediately; and requested them to advance it; and to induce them to do so offered to transfer the funds mentioned in the bill as a security as well for the balance then due, as also what they should advance to him for his then occasions, and also all other sums, which they should at any time hereafter pay on his account; and these defendants having at the earnest solicitation of Simpson agreed to advance the money, which he had then immediate occasion for, he on the 11th of May, 1797, transferred to them £100 Three per cent Consolidated Annuities, and the several sums of stock mentioned in the bill. The £100 Three per cents were then standing in the names of Lush and Elizabeth Smith; and all the other funds in the name of John Smith; which the defendants knew, by reason that at the request of Simpson they received the dividends under a power of attorney granted by Elizabeth Smith; which they always placed to the credit of Simpson's account with them.

They denied, that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of Simpson as executor or devisee of Elizabeth Smith; or that they were part of the personal estate of John Smith; on the contrary they believed, they were Simpson's own property: and he represented to them, that he was absolutely entitled thereto, subject only to an annuity of £20 to Elizabeth Smith's sister during her life, and to a few very small legacies; that he had full right to dispose thereof; and would have disposed but for the low price of the funds; which he expected would rise. They also stated, that they did not know any of the legacies of John Smith to the plaintiffs or any other person were unpaid. The answer then set forth a letter from him to them, dated the 20th of April, 1797; stating the death of Elizabeth Smith; that she had left him the whole of her property, both real and personal, paying £20 a year to her sister for life, then seventy-six years old, and a few very small legacies; that he intended to be in London by the 28th; supposing her will must be proved in London, on account of the money in the funds; and stating his intention to produce the will to them, before he should do anything, as being well assured, they would advise him for the best to save expense.

The answer then stated, that in consequence of the said transfer, and upon the faith, credit, and validity thereof, the defendants on the 13th of May, 1797, paid bills and notes on account of Simpson to the amount of £673 1s. 6d. then outstanding; which they believe was the sum or part of it, which he was anxious to provide for. On the 16th of February, 1798, he gave the defendants the following authority in writing:—

LONDON, 16th February, 1798.

Messrs. Moffatt, Kensington, and Styan.

GENTLEMEN: — Having some time back transferred into the name of your partner, Mr. John Pooley Kensington, sundry sums of different stocks and annuities as a security for any advances or engagements, which you might at that time have come under, or might at any future time come under, for me, I hereby authorize you to sell or otherwise dispose of the same, whenever you may think proper, at my risk, and for my account; and I will confirm and approve of the same; and will, whenever required by you, execute a legal instrument to that effect.

JOSEPH SIMPSON.

The answer farther stated, that upon the faith of the said transfer and security of the said funds the defendants did after such transfer and on the credit thereof pay the bills of Simpson to a much greater amount, and suffered him to be in arrear to defendants in a much larger balance than they had before done; insomuch, that on the 21st of June, 1798, when Simpson became bankrupt, he was indebted to defendants on the balance of accounts in £1,435 19s. 6d. They never had any other security; except, that Simpson and Elizabeth Smith executed a bond to them, dated the 22d of December, 1795, for securing any balance, which might be due from Simpson in account between him and them, and the bills, drafts, and notes, paid to them as his bankers; and which, when received, they placed to the credit of his account with them.

The answer was replied to; but the plaintiffs did not go into evidence.

Mr. Cox and *Mr. Fonblanque*, for the plaintiffs.

Mr. Stanley, for defendants in the same interest.

Mr. Piggott and *Mr. Trower*, for the defendants, the bankers.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is whether the plaintiffs, legatees, can follow the assets in the hands of third persons, to whom the executor has transferred them. There is [no] evidence in the cause but the answer. I cannot therefore infer anything against the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admission or denial of every fact, within the knowledge of the defendants. I cannot assume, that they ever saw Mrs. Smith's will; though Simpson says, he was to produce it to them; for they do not say, they ever did see it. Without doubt the plaintiffs are entitled to a decree against the executor, now a bankrupt; and his assignees are parties.

Several well known cases were referred to on both sides. The defendants rely upon *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Lord Orrery*, 3 Atk. 235; and *Whale v. Booth*, 4 Term Rep. B. R. 625, note, as establishing the absolute right of the executor to bind the assets by any disposition; at least, where there is no actual fraud in the party taking under it. The other cases, *Humble v. Bill*, 2 Vern. 444; *Crane v. Drake*, 2 Vern. 616; *Farr v. Newman*, 4 Term Rep. B. R. 621; *Bonney v. Ridgard*, 2 Bro. C. C. 438; and *Andrew v. Wrigley*,

4 Bro. C. C. 125, are relied on by the plaintiffs; as showing, that there are limits to that rule; which limits they contend are here transgressed. Though it is difficult to reconcile all the doctrine and *dicta*, that are to be found in the cases, the decisions do not appear to me to be inconsistent. It is true, that executors are in equity mere trustees for the performance of the will; yet in many respects and for many purposes third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them; for the power of disposition is generally incident; being frequently necessary; and a stranger shall not be put to examine, whether in the particular instance that power has been discreetly exercised. But from the proposition, that a third person is not bound to look to the trust in every respect and for every purpose, does it follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee; when he knows, the executor is applying the assets to a purpose wholly foreign to his trust? No decision necessarily leads to such a consequence.

In *Nugent v. Gifford* it appears from the Register's Book, as stated in *Andrew v. Wrigley*, though not in the report in Atkyns, that the testator died two years before the executor and residuary legatee made the assignment, that was impeached. At least therefore there was room to suppose, that the executor might in that period by advances on account of the trust have entitled himself to reimbursement out of the assets: but even so explained, the late Master of the Rolls would not go farther than to say, that case might be rightly determined; and in *Scott v. Tyler*, Lord Thurlow said (2 Bro. C. C. 477), it was difficult to reconcile it with *Crane v. Drake*. In *Mead v. Lord Orrery*, Lord Hardwicke, instead of stating shortly and generally, that an executor has the absolute right to dispose, as he pleases, of the testator's property, enters into all the circumstances to show, that in that case the assignment ought to stand; that it was made several years after the testator's death; that it was not the case of a sole executor disposing for his own benefit, but of three executors, two not interested, one a residuary legatee; that, as he was one of the executors, and in his banking shop the money affairs were transacted, he might have been, as he was recited to be, the sole owner of the mortgage: he might be a creditor for that sum by advances made by him: or it might have been released and assigned to him by the other executors, as his share of the residuary estate. Under all those circumstances perhaps it would have been hard to have deprived the assignee of the benefit; and yet Lord Kenyon in *Bonney v. Ridgard*, with an accurate note of which I have been favored by Mr. Cox, declared his dissent from that case; and declared, he should have given the opposite decision; and yet there was nothing like express fraud; and no motive for it, in order to obtain that assignment; for Mead the younger was not indebted; but was only to give security for what might come to him afterwards as receiver; and he used the mortgage for that purpose. It was indifferent to them, whether they had

that or any other security. But Lord Kenyon says, that, if there is either express or implied fraud, the purchaser is bound. In *Whale v. Booth*, though that case seems overruled by *Farr v. Newman*, stress was laid upon the circumstance, that the testator had been dead three years; and Lord Mansfield says, "If the executors paid all demands, as in that time they might have done, the assets belong to them."

Those three cases for the defendants are in some degree impeached in subsequent decisions. But, supposing they were not impeached, there is nothing in any of them excluding the possibility of the executor having acquired on the execution of the trust, a right to appropriate to himself the assets. But in this instance the assignment was made in less than a month after the death of Mrs. Smith. There is not therefore the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith by payments made in that short interval on account of either estate. It is not pretended, it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his, then actually outstanding. They had distinct notice therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purpose of the executor. Allowing every case to remain undisturbed, does it follow from any, that an executor in the first month after the testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will; which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson; and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right. It may be essential, that the executor should have the power to sell the assets; but it is not essential, that he should have the power to pay his own creditor; and it is not just, that one man's property should be applied to the payment of another man's debt.

But the question is, not, whether the rule is now to be made more strict, but whether general justice and convenience require it to be relaxed beyond all former precedent. I should hesitate to go so far as other cases have gone: but this would go much farther than any. If the second point in *Scott v. Tyler* had received the decision which it was generally supposed would have been given,¹ it would be an au-

¹ It has since appeared, that, though that point ended in a compromise, Lord Thurlow had formed his judgment upon it against the bankers. See 2 Dick. 724. — REP.

See *McLeod v. Drummond*, 17 Ves. 152, 166 (1810). — ED.

thority far beyond what these plaintiffs want; for in that case the executrix had disposed of the River Lee Bonds four years after the death of the testator. The bankers swore, they knew nothing of the will; and they believed the bonds her own property, not that of the testator. If that case had been decided against the bankers, it would have furnished a stronger authority than is necessary for these plaintiffs.

Hitherto I have supposed the executor pretending on other authority than as executor; and that the other defendants relied solely upon his authority in that character. But the truth is, it was not upon his legal authority as executor that they relied: but they proceeded, as they state, upon the faith of his representation; by which they were induced to believe, that the property he assigned to them was actually his own; as the testatrix had left him everything, subject only to £20 a year, and a few small legacies. This representation is partly true, partly false. He was her residuary legatee; and it is taken for granted on all sides, that she had a right to dispose of this property: but he was subject to something more than £20 a year, and some trifling legacies, viz., the claims under her husband's will. This they would have seen, if they had looked at her will, instead of taking his representation. They would have seen, that he had no right to assign the stock, till the claims under that will were satisfied; and that some of those claims were unsatisfied. Common prudence required, that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud: but they acted rashly, incautiously, and without the common attention used in the ordinary course of business; the reference in the will of Mrs. Smith to the will of her husband making it the same, as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information, which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding, that assets transferred [under] such circumstances may be followed.

For the defendants it is objected, that the plaintiffs were guilty of laches in not taking steps to secure their legacies in the life of Mrs. Smith. But one was an infant, when the bill was filed; and his legacy was not payable till her death; and though the plaintiff Hill might have filed a bill, it was not gross negligence not to do so for so small an object. There was no reason to think the fund was in danger; and upon inquiry she would have found stock sufficient left to answer her legacy. Upon the whole I am of opinion, these funds are liable to answer the plaintiffs' demands.¹

¹ See, *accord.*, *Wilson v. Moore*, 1 Myl. & K. 337 (1834); and see also *McLeod v. Drummond*, 17 Ves. 152, 169 (1810).

TAYLOR v. HAWKINS.

CHANCERY. 1803.

[Reported 8 Ves. 209.]

RICHARD HAWKINS, being possessed of certain leasehold premises at Rotton Park, Birmingham, subject to a mortgage to Mary Dalton, by his will, dated the 6th of January, 1790, bequeathed the mortgaged premises and other leasehold estates to his son William Hawkins, to hold to him, his executors, &c., for the residue of the terms, subject to an annuity of £15 to his son Richard Hawkins for twenty years, if he should so long live; and in case his said son should die before the expiration of that term, then to the payment of the said sum of £15 for the remainder of the twenty years to his (the testator's) wife for the use of his children, Sarah, Mary, and George Hawkins; and he appointed his wife and his son William executors.

Richard Hawkins, the testator, died in November, 1792. The executors proved the will. William Hawkins being engaged in trade in partnership with Thomas and John Hawkins became indebted to the plaintiffs as bankers to the amount of £2,000; and in June, 1793, they executed a bond in the penal sum of £3,000; and also by indenture of mortgage, dated the 24th of June, 1793, William Hawkins assigned the premises at Rotton Park to the plaintiffs, subject to the mortgage to Mary Dalton, and to the annuity of £15 under the will of Richard Hawkins, and to a proviso for redemption on payment of £1,500 and interest, and all other sums to be advanced by the plaintiffs.

In October, 1796, William Hawkins and his partners became bankrupts. In March, 1798, by consent of all parties the mortgaged premises were sold for £1,600. Upon that occasion James Reynolds informed the purchaser, that he was a creditor of Richard Hawkins the elder, by a bond, dated the 20th of July, 1784, in the principal sum of £300; and gave notice not to pay his purchase-money.

The bill filed by Taylor and his partners, Taylor being also administrator of Mary Dalton, prayed an account of the personal estate of the testator Richard Hawkins; that the purchaser may pay his purchase-money; and that the purchase-money may be applied in satisfaction of the mortgages; and that the defendant Reynolds may be decreed not to have any lien or claim upon the purchase-money in preference to the plaintiffs.

The defendant Reynolds by his answer insisted upon his bond for money lent; and stated frequent applications to the executors before the bankruptcy. He claimed a balance of £452 8s. 10d. as due upon the bond, after deducting a sum of £94 1s. received from the sale of leasehold premises mortgaged to him as an additional security. He insisted, that the surplus of the purchase-money after satisfying Mrs. Dalton's mortgage ought to be applied in satisfaction of what remains due on his bond in preference to the mortgage to the plaintiffs; especially as such mortgage was executed, not for the purpose of raising any money to discharge the debts of the testator, but only to secure

the payment of debts personally incurred by William Hawkins and his partners with the plaintiffs in the course of their trade. He denied all fraud and collusion with Hawkins; and insisted, that he is a *bona fide* creditor; and ought to be paid out of the leasehold premises, as being the assets of Richard Hawkins, in preference to the plaintiff's demand.

Mr. Romilly and *Mr. Cooke*, for the plaintiffs.

Mr. Alexander, for the defendant Reynolds; *Mr. Richards*, for the other defendants.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] I do not recollect any case, in which the property was specifically bequeathed to the executor: but the person, to whom it has been specifically given, has generally been the party complaining. In this case there is not enough in this answer to ground an inquiry; if not, there is nothing to stand upon. There must be some foundation for an inquiry; as if he had said, he believed, they knew, there were debts unpaid. The decree must therefore be according to the prayer of the bill.¹

LEPARD v. VERNON.

CHANCERY. 1813.

[*Reported 2 V. & B. 51.*]

WILLIAM VERNON, the younger, having in 1805 contracted to erect buildings, &c., for the Board of Ordnance, and being indebted to Goodacre and Buzzard, his bankers, to the amount of above £8,000, on the 15th of March, 1809, executed to Down & Co. their bankers in London, a power of attorney, enabling them to procure and receive from the Board of Ordnance "all such sum and sums of money as now are, or which may hereafter from time to time become, due and payable" to him. He died on the 16th of June, 1809; and afterwards Down & Co. on the 24th of the same month received the sum of £2,600 and upwards on his account from the Board of Ordnance.

By an assignment, dated the 13th of December, 1809, William Vernon, the elder, as one of the executors of William Vernon the younger, assigned to Goodacre and Buzzard the money then due or to become due to the estate of the testator from the Board of Ordnance, under the before-mentioned contract, in payment of £3,485 12s. 3d. alleged to be due from the estate of the testator to Goodacre and Buzzard; and also gave them a warrant of attorney of the same date, to confess judgment *de bonis testatoris*; on which they entered up judgment.

Two bills were filed: one by the two executors of Vernon, Jr., who were not parties in that transaction, for an account, &c.; and another by Goodacre and Buzzard; claiming under their assignment, warrant of attorney, and judgment, to receive from the Board of Ordnance what had become due since the last payment; and by their answer to the

¹ See *Spackman v. Timbrell*, 8 Sim. 253, 260 (1837).

other bill insisting, that the delivery of the power of attorney by the testator to Down & Co. for the use of Goodacre and Buzzard was equivalent to an assignment of his interest in the money; that they therefore had a power, coupled with an interest; that the money was well received by Down & Co., and they had a right to apply it in liquidation of their demand against the testator's estate. There was parol evidence of declarations by the testator, that the power was given to enable the bankers to apply the money to their debt.

Sir Samuel Romilly, Mr. Leach, and Mr. Wray, for the two executors, plaintiffs.

Mr. Hart and Mr. Trower, for the bankers.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is, to which of these claimants the money belonged. It is contended, that Goodacre and Buzzard are entitled to retain it; as, though William Vernon died, before it was received, the power of attorney was not revoked by his death; that, being given to them to secure a debt due, it was not a revocable power. There is no written evidence of the purpose, for which it was given. It is a mere common power, not accompanying any assignment of the debt, nor making part of any security given to the bankers. There is indeed parol evidence, that Vernon had declared, it was to enable them to apply the money to the debt, due to them. But that is not enough to operate as an appropriation of the money, or to prevent it from becoming part of the testator's assets. In the case of *Mitchell v. Eades*, Pre. Ch. 125, the power was made irrevocable: yet it was not allowed to be effectual against the general creditors after the death of the debtor.

The other claim was under the assignment by one of the executors, William Vernon, subsequent to the testator's death. It is said, as each of the executors has the power to dispose of the assets, the assignment by one is good. If he had parted with any portion of the property to Goodacre and Buzzard, if by the assignment they had obtained any legal advantage, it could not perhaps be taken from them: but this is a mere assignment of a chose in action by one of several executors, of which no use can be made, unless this court shall act upon it, and interfere to give the particular creditor an advantage against the other executors and the general creditors. That the court will not do; but will direct the money to be paid to the other executor for the benefit of the general creditors. Goodacre and Buzzard have a judgment, it is true; but that does not make them the persons entitled to receive the debt; though it may give them a priority in the administration of assets. It is for the other creditors to consider, whether they should not make application to the court of law, in which the judgment was entered up. Upon the case of *Ehwell v. Quash*, 1 Str. 20, I conceive, that judgment will be found to be of no avail.

The bill of Goodacre and Buzzard to have the money paid to them must be dismissed with costs as against the Board of Ordnance, and without costs as against the other executors; and upon the bill of the other executors the money must be paid out of court to them.

RUSSELL v. PLAICE.

CHANCERY. 1854.

[Reported 18 Beav. 21.]

RICHARD ADAMS TIBBITS died intestate, and Elizabeth Tibbits, his widow, took out letters of administration to his estate, which consisted in part of some leaseholds for years. By indenture dated 29th of September, 1849, the administratrix assigned the leaseholds to Joseph Russell, the plaintiff, by way of mortgage, to secure the sum of £600, but, in case of default in payment of principal and interest, in trust to sell, with power to give receipts and discharges for the purchase-money. Default having been made, the plaintiff, on the 20th of December, 1852, put up the premises for sale by auction, but at the request of John Adams Tibbits, the intestate's son, and of the husbands of the intestate's two daughters, and upon their undertaking, by a memorandum in writing, dated the same day, to pay the amount of principal, interest and costs, due to the plaintiff, on or before the 12th of January, 1853, the sale was not proceeded with. The memorandum contained this proviso, that "if the money be not paid at the time stated, the mortgagee shall be at full liberty to resort to the powers of sale forthwith."

Default having been again made in payment of the money, the plaintiff caused the property to be put up for sale by auction, on the 28th of February, 1853, in two lots, and the defendant, Osborne Plaice, became the purchaser of lot 1. An abstract of title having been delivered to him, he objected that a good title could not be made, on the ground that the administratrix had no authority to create the power or trust for sale contained in the indenture of mortgage, and that the memorandum of the 20th of December, 1852, did not preclude the parties who signed it from objecting to the exercise of such power or trust for sale.

The intestate died, leaving his widow, three sons and two daughters, him surviving. Thomas Adams, one of the sons, died an infant, and Richard Adams, another, bequeathed his share of the property to his mother. John Adams, the third son, and the two daughters, whose husbands signed the memorandum, were, therefore, the sole next of kin of the intestate, and the only persons entitled to dispute the sale.

The defendant having refused to complete, the plaintiff filed his bill for specific performance of the contract.

Mr. Greene, for the plaintiff.

Mr. Shebbeare, contra.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] reserved judgment.

THE MASTER OF THE ROLLS. The question in this case is, whether it is so clear, that the power of sale contained in a mortgage by a legal personal representative is good, that this court will compel a purchaser to take a title depending on the validity of such a power?

It is not, nor on principle or authority could it be, disputed, that a sale, a mortgage or a pledge of the property of a deceased person, by his executor or administrator, made *bona fide* for the purpose of administration, is valid; but it is contended, that though an executor can mortgage, he cannot, in such mortgage, give the mortgagee a power to sell, that to do so would be a violation of the principle that *delegatus non potest delegare*. Several authorities were cited and commented upon before me, and especially the case of *M'Leod v. Drummond*, 17 Ves. 152, 167, where Lord Eldon enters, at length, into the learning on the subject of the general power of the executor to sell, mortgage and pledge the property of his testator. In that case, Lord Eldon seems to have considered, that if the bill had been filed by residuary legatees or creditors, and within a reasonable time after the deposit had been made, the court would have directed the securities to be delivered up, and in the course of his judgment he observes, "that there is a great difference between directing an instrument to be delivered up, where, upon the circumstances under which it was deposited, that would be too much, and in equity calling upon that person and others to make it effectual." In consequence of this, I thought it proper to reserve my judgment, in order more fully to consider the effect of the cases and the principles involved in them, so far as they are applicable to the case before me. I forbear to cite them in detail, as they are, for the most part, commented upon in the case of *M'Leod v. Drummond*; and though many of the points discussed in them bear no relation to the case before me, the principles to be found in them applicable to the question before me are, I think, well laid down by Sir John Leach in the case of *Keane v. Robarts*, 4 Madd. 332. It is established by these cases, that a mortgage of the assets of the deceased person, by a legal personal representative, for money advanced at the time by the mortgagee, who is not acting collusively with the executor or administrator, cannot afterwards be called in question, even though the executor or administrator should subsequently apply that money to his own use. Were it otherwise, no one could safely deal with a legal personal representative, and the persons interested in the deceased's estate would be prejudiced by reason of the fetters which would be thus imposed on the executors in their dealing with the assets they are bound to administer.

No question of *devastavit* or improper application arises here; it cannot therefore be disputed, that the mortgage made by the widow, Elizabeth Tibbits, was a valid and effectual mortgage. But the objection is, that though such mortgage may be good, it cannot properly contain a power of sale, for that by giving one, she delegates to another the trust reposed in herself. I am however of opinion, that a little consideration of the distinction existing between the powers intrusted to her and those given to the mortgagee removes this objection. The power which the executors or administrator possesses, of making a valid mortgage, appears to me to include in it a power to give all that is properly incidental to that species of alienation. An executor, who sells

property of his testator, necessarily gives the purchaser a power of selling the property bought, because such a power is incidental to and inseparable from the estate conferred upon him by the conveyance. The power of sale given to a mortgagee must, I think, be considered, not as the delegation of a power intrusted to the executor, which is a power to sell for the benefit of his *cestui que trust*, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the persons interested in the assets would be injured, because, in that case, a mortgage could not be effected, unless on terms less advantageous than could be obtained if the person advancing his money obtained the same security as if he was dealing with the absolute owner of the estate. For the purpose of selling the estate of the testator, the executor is considered as the absolute owner, and has all the power incidental to that character. On what principle can it be maintained that he is not to be regarded in the same light and to have the same power, for the purpose of effecting a mortgage, which may be the most beneficial course to be adopted for his *cestui que trust*, and of which benefit the executor is constituted the sole judge?

This view of the case is also confirmed by the consideration, that the executor or administrator may pledge a part of the testator's assets, for the purposes of enabling him better to administer the estate, and that the right of the pledgee to sell the property pledged, if not redeemed within the proper time, is not and cannot be disputed.

I can discover no reason for making the case of a mortgagee the sole exception. I am therefore of opinion, that this sale is good, and that the contract must be specifically performed.

I have preferred deciding this case on the grounds I have stated, as, if confirmed, it will settle the principle on which executors and administrators are to act in such cases, rather than to decide it on facts peculiar to the particular case before me. But I am, in this particular case, confirmed in the view I take, by the circumstance, that all the next of kin of the intestate, except the widow, concur in affirming the validity of this sale, and that the widow herself, as she gave the power to sell, cannot hereafter contest the propriety of its being exercised.

I must, therefore, decree the contract of the 28th of February, 1853, to be specifically performed; and as the title is no longer in question, it must be referred to me in chambers to settle the conveyance, in case the parties differ. I understood at the hearing, that the costs were arranged between the parties; but if not, as this was a question to settle a matter of some doubt, and was properly brought forward to obtain the opinion of the court, I shall give no costs on either side.¹

¹ See *Vane v. Rigden*, L. R. 5 Ch. 663 (1870): *Cruikshank v. Duffin*, L. R. 13 Eq. 555 (1872).

WOLVERHAMPTON AND STAFFORDSHIRE BANKING
COMPANY v. MARSTON.

EXCHEQUER. 1861.

[Reported 7 H. & N. 148.]

IN this case the defendant was executrix of her late husband, who had devised to her the whole of his property, subject to the payment of his debts. The plaintiffs had recovered judgment against the defendant, as such executrix, in an action on a bill of exchange accepted by the testator, and thereupon a writ of *fi. fa. de bonis testatoris* was issued. Upon the sheriff proceeding to levy under the writ, the goods seized were claimed by certain persons under a deed of assignment, executed by the defendant after probate of the will and after judgment, but three days before the execution, whereby she assigned all the property and effects of the testator to the claimants in trust to realize the same and pay the proceeds to his creditors. The sheriff thereupon took out an interpleader summons at chambers, and when the parties attended before the judge, it was agreed that the court should determine their rights without an interpleader issue.

Gray, for the claimants.

Raymond, for the execution creditors.

Andrews appeared for the sheriff.

POLLOCK, C. B. I am of opinion that the assignment of the testator's effects by his executrix to trustees, for the benefit of his creditors, is valid as against the plaintiffs, who are the execution creditors. The case seems to me to fall within the principle of the decision in *Pickstock v. Lyster*, 3 M. & Sel. 371, where a debtor, being sued by one of his creditors, pending the suit and before execution assigned all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken; and it was held that the assignment was not fraudulent within the 13 Eliz. c. 5, although made with the intent to delay the creditor who sued. It was there said that such an assignment was for the benefit of all the creditors, to procure an equal distribution amongst all of the fund to which all had an equal right, against one who had gained the first step upon them; and the assignment was referred to an act of duty rather than of fraud, arising out of a discharge of the moral duties attached to the character of debtor, to make the fund available for the whole body of creditors. Then, if a debtor may make such an assignment, why may not his personal representative make it? Applying the principle of the decision in *Pickstock v. Lyster*, I think that this assignment is valid, notwithstanding its object was to defeat a particular creditor.

MARTIN, B. I entertain no doubt that this assignment is valid, and vested the property in the assignees. An executor may sell and dis-

pose of the testator's effects, or distribute them amongst the body of creditors, — in fact he has as much dominion over them as the testator had when alive.

WILDE, B. I also think that the assignment is valid. Whether or no the executrix committed a *devastavit*, is another question. Upon that I give no opinion.

Order that the claim of the execution creditors be barred.

SMITH v. WHITING.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[Reported 9 Mass. 334.]

CASE “for that the said Aaron at, &c., on, &c., by his note under his hand of that date, for value received in a debt due to the estate of Ephraim Pollard, deceased, promised John Hartwell and Mary Pollard, executors of the last will of said Ephraim Pollard, to pay them 566 dollars 22 cents in one year from date, with interest; and the said John, who acted as executor as aforesaid, afterwards on, &c., at, &c., by his indorsement on said note, under his hand, for value received, ordered the contents thereof, then due and unpaid, to be paid to the plaintiff; of all which the said Aaron then and there had due notice, and thereupon became liable to pay the same to the plaintiff. Yet though requested,” &c.

The defendant demurred generally to the declaration, and the plaintiff joined in demurrer.

Chickering, in support of the demurrer, cited the cases of *Betts v. Mitchel*, 10 Mod. 315; *Orde v. Fenwick*, 3 East, 104; *Hosier et al. v. Lord Arundel*, 3 B. & P. 7.

J. Richardson, for the plaintiff, cited the cases of *Rawlinson v. Stone*, 3 Wils. 1, and *King et al. v. Thom*, 1 D. & E. 487.

The action stood continued *nisi*, and the next week, in Middlesex,

THE COURT observed that, having looked into the cases cited in the argument, they were satisfied that the defendant must prevail. The question is, whether one of two executors is competent to transfer by indorsement a negotiable promissory note made to the two in their character of executors. The promisees, not being copartners, had each but a moiety. One therefore could not assign the whole. Nor was it competent for him to assign his moiety.

*Declaration adjudged bad.*¹

¹ *Clark v. Gramling*, 54 Ark. 525, 529 (1891), accord. In *De Haven v. Williams*, 80 Pa. 480 (1876), co-executors deposited money of the estate with bankers to their joint account as trustees. The bankers failed and thereafter one of the executors

LYMAN v. NATIONAL BANK OF THE REPUBLIC.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1902.

[Reported 181 Mass. 437.]

HOLMES, C. J. This is a bill brought by the administrator *de bonis non* of the will of Isaac N. Tucker, to compel the surrender of certain stock and bonds alleged to have been pledged unlawfully by the former executrix of the same will. The advance for which the pledge was given was made by the bank in good faith and placed to the credit of the estate. Afterward it was drawn out by the executrix upon a check to her own order. The money was applied to her private use, but this was without the privity of the defendant. The form of the check gave no notice of her intent to misapply the funds and imposed no duties on the bank. Some stress is laid on the statement in the agreed facts that the son of the executrix "applied in her name" for the loan, but the loan necessarily was made to her and it is plain that the president of the bank understood that it was for the benefit of the estate, or, according to popular phraseology, that it was made to the estate. The bill is based on a general allegation of illegality, and the only question necessary to be considered under either the bill or the evidence is the general one whether an executor has power to pledge the assets of the estate. This power is so fully established as an incident of his absolute control over the property that it is not necessary to do more than to cite a few of the cases. *Carter v. National Bank of Lewiston*, 71 Maine, 448; *Smith v. Ayer*, 101 U. S. 320, 326; *Scott v. Tyler*, 2 Dick. 712, 725; *M'Leod v. Drummond*, 17 Ves. 152, 154; *Russell v. Plaice*, 18 Beav. 21, 26; *Eurl Vane v. Rigden*, L. R. 5 Ch. 663, 668, 670; 1 Wms. Ex. (9th ed.) 802, 803. Of course the contract of borrowing can bind the executor only personally in the first instance, but that is due to the fact that the estate as such is not a person and that the executor cannot contract otherwise. *Durkin v. Langley*, 167 Mass. 577, 578. See *Sumner v. Williams*, 8 Mass. 162. Compare *Mason v. Pomeroy*, 151 Mass. 164. The fact that it is in that form does not invalidate the pledge. See *Farhall v. Farhall*, L. R. 7 Ch. 123, 125.

It is said that the defendant was charged with notice of the contents of the will. If this be so, there is nothing in the will to cut down the power of the executrix. This property was part of the residue, and

signed an agreement under which all the property of the bankers was to be passed to a trustee for creditors, and the bankers were, upon the assent of all the creditors to this agreement, to be released from their debts. It was held that one executor had no power thus to release the claim of the estate against the bankers.

Contrary to the principal case are *Bogert v. Hertell*, 4 Hill, 492 (N. Y. 1842, overruling the Chancellor who (9 Paige, 52) affirmed the decree of the Vice Chancellor, 3 Edw. Ch. 20, *sub nom. Hertell v. Van Buren*); *Mackay v. St. Mary's Church*, 15 R. I. 121, 124 (1886); *Fesmire v. Shannon*, 143 Pa. 201 (1891). Cf. *Packer v. Owens*, 164 Pa. 185, 192 (1894).

although the will provided that after the death of the executrix the residue should be held upon certain trusts, that fact did not limit her official authority. She did not act by virtue of her interest in the fund or as trustee, but under her prior and paramount title as executrix. Whether the gift of the testator's business enlarged her powers need not be considered. As we are of opinion that the plaintiff has no case on the merits, it is unnecessary to discuss anything else.

*Bill dismissed.*¹

A. M. Lyman, pro se.

C. M. Reed, for the defendant.

¹ See *Carter v. Manufacturers' Bank of Lewiston*, 71 Me. 448 (1880).

CHAPTER VII.

PAYMENT OF DEBTS, LEGACIES, AND DISTRIBUTIVE SHARES.

SECTION I.

SURVIVAL OF CLAIMS.

SWAN v. STRANSHAM.

COMMON PLEAS. 1566.

[Reported Dyer, 257 a.]

TENANT for term of life, remainder over in fee, by indenture demised, granted, and to farm let, for the term of fifteen years fully to be completed, rendering thereout annually during the aforesaid term twenty shillings to the lessor, his heirs, and assigns, without any warranty in the deed, or any express covenant that the lessee should enjoy the term. And within the term the lessor died, and he in the remainder entered upon the lessee, and he brought an action of covenant upon the indenture against the executors of the lessor, and showed the case as above, in the declaration, supposing the covenant broken by the executors, against the form and effect of the indenture aforesaid; and upon this the defendants demurred in law. And in Hilary Term, 9th of the present queen, the case was argued at the bar and bench. And by the opinion of all the Justices the plaintiff shall be barred. And defects were found in the declaration because the plaintiff had not alleged in fact that he was possessed, and afterwards expelled, &c., but by implication. Also the particular estate with the remainder over ought to have been certainly alleged, and not *by implication*, &c. Also the form of the writ should have been *quod teneat conventionem, &c., de dampnis et de perditis occasione, &c.* For the matter in law, three of the Justices, *s.* WELSHE, BROWNE, and DYER thought, that the executors should not be charged by this covenant in law, because the covenant in law ends and determines with the estate and interest of the lessee; and if it had been a covenant in fact or expressed, or warranty of the term expressed, it would be otherwise; and no cause of action is given against the testator in his lifetime: and for the argument of this case see the treatises *de Natura Brevium*, and the Register, and M. 4, [E. 3, 57, pl. 71,] and M. 7, E. 3, [65 a, pl. 67,] where the heir shall be charged in covenant, and the Statute of Bigamy [4 E. 1, St. 3, c. 6,] *s. dedi et concessi*, and M. 11, H. 6, [East, fol. 41 b,] 6 H. 7, [2 a, pl. 3,] and 2 H. 4, [6 b, pl. 25,] and 42 E. 3, [3, pl. 14,] and 20 [30] E. 3, [6 b, 14 a, b,] in ward, by *The Queen*

Philippa v. Simkyn Simeon, and 47 and 48 E. 3, [22 a, pl. 50,] and 22, [1 b, pl. 4,] and 32 H. 6, [52 b, pl. 26, 32 b, pl. 27,] and 26 H. 8, [3 b, pl. 11.] And afterwards, in Hilary Term, it was again argued at the bench. And for the matter in law *Weston* was of opinion against the three other Justices, because the lease was by indenture, which is matter of conclusion and estoppel; but if it were by deed poll, he agreed with his companions. And *quære* what difference, &c. But *Browne* put this case. A man seised in fee-simple made such a lease by indenture for years as above without express covenant, and died, and his heir in and by descent ousted the termor, he shall have an action of covenant against the heir for the privity, &c. And so the assignee of the termor shall have against the lessor if he be ousted by him without express words of warranty or assignment, *quære* thereof, and see the Statute 32 H. 8, c. 34. And afterwards, in Easter Term following, judgment was given against the plaintiff in the principal case before. The same case in effect was so ruled in Trinity, 22d of the present queen, between *Broderidge* and *Windsore*; and a demurrer to the declaration, because no express covenant or warranty of the term was comprised in the indenture, but a naked covenant in law.¹

WHITEACRES v. ONSLEY.

1573.

[*Reported Dyer*, 322 a.]

DEBT by Whiteacres and others, executors of Warde, against Onsley and Tirril, executors of R. T., late warden of the Fleet, and count upon a recovery in debt by the testator against one Thurland, in C. B. for which he was in execution in the Fleet, whence the testator of the defendants, being warden there, suffered him to escape, the debt not satisfied to the plaintiff; whereby an action accrued, &c., against the said warden in his lifetime, and since his death against his executors. And note, the words of the escape which charge the warden, are "that the aforesaid T. by default of the said warden, escaped at large; the aforesaid plaintiffs not satisfied of the debt and damages aforesaid, &c." And the defendants demurred upon the count; and the opinion of the court was, that such action does not lie against the executors for the escape, unless the warden himself in his lifetime was convicted and adjudged of the escape; for the offence is only a trespass by negligence. And see the Statute of 1 R. 2, c. 12, accordingly for such escape out of the Fleet: for at the common law no writ of debt lies as

¹ Followed by *Adams v. Gibney*, 6 Bing. 656 (1830). And as to what is an express covenant as distinguished from a covenant in law, see *Williams v. Burrell*, 1 C. B. 402 (1845).

it seems, but an action on the case. And by INGLEBY, 41 Li. Ass. [15], an action for such escape does not lie against the executors of the warden. And H. 10 of the present queen [*ante* fol. 271 a, pl. 25] such an action against the heir of the warden does not lie by the opinion of the court.¹

TUCKE'S CASE.

EXCHEQUER. 1590.

[*Reported 3 Leon. 241.*]

IN this case, it was holden by all the Barons clearly, that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator, no not in the case of the king, because it is a personal wrong only.²

HAMBLY v. TROTT.

KING'S BENCH. 1776.

[*Reported Cowp. 371.*]

LORD MANSFIELD.³ This was an action of trover against an administrator, with the will annexed. The *trover* and *conversion* were both charged to have been committed by the testator in his lifetime: the plea pleaded was, that the *testator* was *Not guilty*. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a *tort*, for which an executor or administrator is not liable to answer.

The maxim, *Actio personalis moritur cum persona*, upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in *form* a *fiction*, and in *substance* founded on *property*, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

¹ Cf. *Perkinson v. Gilford*, Cro. Car. 539 (1689).

² "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong; it is otherwise here, and the common law will come to it at last." — *Per* LORD FINCH, C., in *Price v. Morgan*, 2 Ch. Cas. 215, 217 (1676). A remedy at law was given by Sta. 30 Car. II. c. 7 (1678); 4 & 5 Wm. & M. c. 24 § 12 (1698).

³ Only the opinion is here given.

We therefore thought the matter well deserved consideration. We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the *cause of action*. *Secondly*, as to actions which survive against an executor, or die with the person, on account of the *form of action*.

As to the *first*; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise of the testator express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* (as is said in Sir T. Raym. 57, *Hole v. Blandford*), supposed to be *by force* and *against the king's peace*, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the *form of action*. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. — No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be, as in this case, that the *testator was not guilty*, can lie against the *executor*. Upon the face of the record, the cause of action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. — An action on the custom of the realm against a common carrier, is for a *tort* and supposed crime: The plea is *Not guilty*; therefore, it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie. — So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in Sir Thomas Raymond, 71 (*Bailey v. Birtles et uxor, executrix of Richard Baily*), which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, “that he was possessed of a *cow*, which he *delivered* to the testator, Richard Bailey, in his lifetime, to *keep* the same for the use of him the *plaintiff*; which *cow* the said Richard afterwards *sold*, and did *convert* and dispose of the money to his own use; and that neither the said Richard, in his life, nor the defendant after his death, ever paid the said money.”

Upon this state of the case, no one can doubt but the *executor* was liable for the *value*. But the special injury charged, obliged him to plead, that the *testator* was *not guilty*. The jury found him guilty. It was moved in arrest of judgment, because this is a *tort* for which the executor is not liable to answer, but *moritur cum persona*. For the plaintiff it was insisted, that though an executor is not chargeable for a *mis-feasance*, yet for a *non-feasance* he is: as for non-payment of money levied upon a *feri facias*, and cited Cro. Car. 539; 9 Co. 50 b; where this very difference was agreed; for non-feasance shall never be *vi et armis*, nor *contra pacem*: But notwithstanding this the court held "it was a *tort*, and that the executor ought not to be chargeable." Sir Thomas Raymond adds, "*vide* Saville, 40, a difference taken." That was the case of *Sir Henry Sherrington*, who had cut down trees upon the queen's land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, Manwood, Justice, said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.¹

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. Sir William Jones, 173-4; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz., that the *testator* was *not guilty*; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of

¹ See, accordingly, *Powell v. Rees*, 7 A. & E. 427 (1837); *Bishop of Winchester v. Knight*, 1 P. Wms. 406 (1717).

action may be brought, as an *action for money had and received*. Therefore, we are all of opinion that the judgment must be arrested.

PER CURIAM.

Judgment arrested.

Mr. Buller, for the plaintiff.

Mr. Kerby, for the defendant.

FINLAY v. CHIRNEY.

COURT OF APPEAL. 1888.

[*Reported 20 Q. B. D. 494.*]

APPEAL of defendants from the judgment of the Queen's Bench Division (*Field and Wills*, JJ.) ordering a new trial.

The defendants were the executors of one G. B. Chirney, and were sued in respect of a breach of promise of marriage committed by their testator during his life. The plaintiff, a widow, was housekeeper to the testator, and was seduced by him under a promise of marriage, a child being born in August, 1884; in April, 1886, Chirney died. At the trial at Newcastle-upon-Tyne before *Cave*, J., the plaintiff was nonsuited upon the ground that there was no corroboration of the promise, no other point being then taken by the defendants. The plaintiff moved before the Divisional Court to set aside the nonsuit, when the objection was taken on behalf of the defendants that an action for breach of promise of marriage would not lie against the executors of a deceased promisor; but no judgment was given upon this point, the court being of opinion that the proper course was to send the case down for a new trial. The defendants appealed.

The pleadings contained no allegation that the plaintiff had suffered any special damage by reason of the breach of promise, but the Divisional Court gave leave to the plaintiff to amend the statement of claim in that respect, and to deliver particulars of the special damage to the defendants. By special leave of the Court of Appeal these particulars, verified by an affidavit of the plaintiff, were used during the argument before their Lordships. It is unnecessary to set out the particulars at length in this report; they fell under the following heads: (1.) Amount expended by plaintiff in preparation for marriage in the purchase of underclothing and of other material for clothing; (2.) Maintenance of the plaintiff from the date of the promise to the death of the testator; (3.) Costs occasioned by the birth of the child, including costs of its maintenance until the testator's death; (4.) Loss of a parish allowance for each of her three legitimate sons until they attained the age of sixteen, withdrawn before they attained that age in consequence of the birth of the illegitimate child; (5.) Loss, owing to the birth of the child, of a legacy of £100, which would otherwise have been left to her by her mother in common with her brothers and sisters.

Waddy, Q. C., and *H. F. Boyd* (*Ernest Pollock* with them), for the appellants.

Digby Seymour, Q. C., and *J. Lawson Walton*, for the respondent.

LORD ESHER, M. R. This was an action brought against the executors of a deceased man in respect of a breach of promise of marriage; it was tried before Cave, J., and evidence as to the facts was gone into, and the only objection raised by the defendants at the trial was, not that such an action would not lie, but that there was no corroboration of the alleged promise. The plaintiff was nonsuited, and she then went to the divisional court; there, besides the contention as to want of corroboration, the further point was taken by the defendants that the action would not lie; this was decided in favor of the defendants, and upon the case as it was presented to them the Divisional Court might have entered judgment for the defendants, but upon the suggestion that special damage might be laid and proved they granted a new trial, giving leave to the plaintiff to amend by adding allegations of special damage. An appeal is now brought to us, and three questions present themselves for our consideration: first, whether the action will lie without special damage; secondly, whether it will lie with special damage; and thirdly, whether, if special damage be proved, the action will lie only for the amount of such special damage, or whether it will lie for all the damages ordinarily given in actions for breach of promise of marriage; all these three formulas are of great importance.

Upon the first question I entertain no doubt whatever; the authority of English law is overwhelming to the effect that no action for breach of promise of marriage can be brought by executors or will lie against them. The authority for this proposition consists in the fact that in the case of *Chamberlain v. Williamson*, 2 M. & S. 408, it was decided that such an action would not lie, at least at the suit of an administrator, and in the additional fact that there is no case to be found in the books where such an action has been maintained either by executors as plaintiffs or against them as defendants, and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question. And besides authority there is the principle expressed in the maxim, *Actio personalis moritur cum persona*. Is an action for breach of promise of marriage a personal action, in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury: that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an

action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behavior; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration of these facts goes to show that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property. The question is therefore concluded both upon principle and by authority. The same has been held to be the law in America, and all the American cases to which I have been able to obtain access are clear upon the point. I am therefore of opinion that the action as brought, there being no allegation of special damage, was wrongly brought, and that judgment was properly given, though upon a wrong ground, for the defendants at the trial.

But in the only English case on the subject, that of *Chamberlain v. Williamson*, there is an exception suggested to this rule which is expressed in the words, "except there be special damage," and on looking at the American cases I find that they say the same thing. I know, however, of no case in which special damage has been laid and the action has been maintained, and there is no authority to enable us to decide how such a case should be dealt with. Indeed I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action; but, assuming there were such damage, is its existence to open the whole case against the executors and make them liable, not only for the special damage resulting from the breach by their testator, but for all the damages which could be recovered in such an action against a living person? Does the action against the executors become an action for breach of promise of marriage, with all the ordinary consequences of such an action, because of the existence of special damage to the plaintiff, or does it lie only for the amount of the special damage? If we were to say that in such a case the whole matter was open for consideration, we should in effect be doing away with the principle that a personal action dies with the person affected by it, and that by reason of the personal nature of the cause of action the executors are not

liable; we should have to say that they would be liable in an action for personal injury, which is nothing but a personal action, and this would break both the rule and the principle. I entertain no doubt whatever that, even if the action will lie upon proof of special damage, it must be confined to a claim for the special damage only, and that a claim for general damages, which would be recoverable from the defendant in his lifetime, must be struck out. Therefore the damage to be considered must be a damage affecting the property of the plaintiff, and for that only can the action be brought.

What is the kind of special damage that can exist under such circumstances? I think it can only exist in cases where the plaintiff can show that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other. Such a promise, if made and proved, would be one of the considerations, or part of the consideration, for the promise of the other party, and there would be one promise moving upon two considerations or upon one complicated consideration. If such an express promise could be proved, it might be sued upon as part of the consideration for the plaintiff's promise; and even though there were no such express promise, yet if circumstances were proved to exist showing that both the parties contemplated that a breach must affect the property of one or the other, an action might be brought; that is to say, if the case were within the rule laid down in *Hadley v. Baxendale*, 9 Ex. 341, an action would lie in respect of a damage to property or a loss of money through the breach.

I think, therefore, that this action will not lie without special damage, and that if special damage be proved it will not lie for anything that is not special damage. If there be special damage, an action will lie for it, and the cause of action will still be for breach of promise of marriage, but the action will lie only for that special damage, whether the damage arises by reason of an express promise which was part of the contract to marry, or whether circumstances existed at the time of the contract which show that such special damage was then within the contemplation of the parties; and it seems that the American cases point to a like state of the law in that country.

The plaintiff therefore was rightly nonsuited at the trial, although upon a wrong ground; she had then upon the pleadings no cause of action, but the Divisional Court granted her the indulgence of a new trial, and gave her leave to amend her statement of claim by inserting an allegation of special damage. In mercy to both the suitors we have thought it right to look carefully into that question, and we gave leave to the plaintiff to say what was the special damage alleged, and particulars have been delivered to us. In my opinion they disclose nothing that can be called special damage within the meaning of the rule that I have enunciated. It is suggested that the plaintiff had bought her trousseau, but it cannot be said that in all cases of a contract of marriage the lady is justified in at once providing herself with

clothes in anticipation of the fulfilment of the contract; in the present case, the plaintiff being in the position of a housekeeper to a farmer, it scarcely seems a reasonable thing to have done. Even in higher ranks of life the same remark would apply: the man who is going to be married has nothing to do with the bride's trousseau, which is provided by her father; if a breach of the promise is committed, the lady still has the clothes, and I cannot think this a good specimen of special damage; besides, such a fact has always been allowed to be given in evidence as an aggravating circumstance, and it is in my opinion not special damage. Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry, the plaintiff had agreed to give it up at once or before the wedding-day, it might be special damage, as being part of the consideration for the promise to marry; but it must be brought to the knowledge of the other party at the time of the contract in order to bring it within the principle in *Hadley v. Baxendale*; if the agreement to give up the place were made after the contract to marry, it would be no part of the promise.

There is one other point which remains to be noticed. It is said that the promise to marry was made as part of an invitation to seduction, and that a child was subsequently born. That would, indeed, be a matter existing at the time of the contract and forming part of the negotiations between the parties, but it would not be special damage, for such a contract would be contrary to public policy, morality and decency, and such a claim could never be allowed. The special damage recoverable in such an action as this must, as I have said, be something affecting the money value of the contract to the plaintiff, and there is no such class of special damage in the particulars. If the whole of these particulars were inserted in the statement of claim, the same result ought to follow; there would be no case for the plaintiff, and the defendants ought to have judgment. I think, therefore, that we ought to go beyond the Divisional Court, and say that there shall be no new trial, and that judgment shall be entered for the defendants. The defendants should have the costs of the trial, and there should be no costs to either side in the Divisional Court or before us.

BOWEN, L. J. The judgment which I am about to read is that of my Brother FRY and myself.

That there was in this case some evidence which, if the jury believed it, would be in corroboration of the plaintiff's own story, we do not doubt, for the reasons indicated during the course of the argument. But a more serious question has been raised as to the liability of an executor in respect of an alleged breach of promise of marriage by the testator whose estate he represents.

The liability of an executor in respect of the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim, *Actio personalis moritur cum persona*, is one of some antiquity, but its origin is obscure and post-classical. Unless, indeed.

some very restricted sense is affixed to the word *personalis*, it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of explaining upon fit occasions that only actions *ex delicto* were within the operation of the principle. "The rule," says the learned editor of Williams' Saunders (1 Wms. Saund. 210), "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed." This remark is true, if confined to the law of recent times, but it is inexact if it be taken as applying to the older English law under which actions based upon an obligation as a rule died with the person. As applied, however, to modern times, the proposition is supported by abundance of authority. "*Actio personalis*," says Willes, C. J., in *Sollers v. Lawrence*, Willes, 413, at p. 421, "is always understood of a tort," and similar expressions occur elsewhere in plenty. But though this gloss or limitation has been forced upon the Latin maxim in later times by the exigencies of a growing society, we are left still in the dark as to the maxim's exact meaning or source. The truth is, that in the earliest times of English law, survival of causes of action was the rare exception, non-survival was the rule. Moreover, the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a quasi-penal character, and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs, as well as all public crimes, are buried," says Lord Mansfield, in *Hambly v. Trott*, 1 Cowp. 375, "with the offender." But survival was also denied to other actions which did not fall within this category. In Bracton's time the general law was, that an obligation was got rid of by the death of either of the contracting parties, Bracton, fol. 101: "Item tollitur morte alterius contrahentium, vel utriusque, maxime si fuerit pœnalis, vel simplex — si autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur, et non extenditur contra hæredes, nec datur hæredibus, quia pœna tenet suos auctores, et extinguitur cum persona." In debt the executor could not be sued where the testator could have waged his law, see *Pinchon's Case*, 9 Rep. 88 a; a condition of things which continued even down to 1805: *Barry v. Robinson*, 1 New Rep. (B. & P.) 293. And when we consider that all actions on the case (as is said by Blackstone, J., in *Mast v. Goodson* (2 W. Bl. 848, at p. 850, decided in 13 Geo. 3), were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of *assumpsit* was after a controversy introduced, it becomes plain that it is within the

last three centuries that the contractual liabilities of an executor have expanded to their present limits.

Modern jurisprudence has, however, since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim, which is set forth in the passage above cited from Williams' Saunders. On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys; *Phillips v. Homfray*, 24 Ch. D. 439, at p. 454. On the other side of the line lie actions founded on any contract express or implied "or any other duty to be performed." Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in assumpsit: *Pinchon's Case*, 9 Rep. 89 b; and this remedial view of the law has been adopted and followed ever since.

The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions *ex contractu* in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner? How far is such an action within, how far without, the maxim *Actio personalis moritur cum persona*? The problem is one which in the nature of things is of later date than the Year-Books. Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognized by our law as a temporal benefit, and a breach of promise of marriage as cognizable by the temporal courts: *Baker v. Smith*, Styles, 295; see also Rolle's Abridgment, Tit. Action on the Case, fol. 22, par. 20; *Hebden v. Rutter*, Sid. 180; and *Harrison v. Cage*, Carthew, 467, a case supposed erroneously by Willes, J., in *Smith v. Woodfine*, 1 C. B. N. S. 667, to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question, and it must be solved mainly upon principle.

It is a striking and not an immaterial fact that no action for breach of promise of marriage against the executors of a deceased person is to be found in the books. We have, moreover, a case decided by Lord Ellenborough and the Court of King's Bench towards the beginning of the century which affords us some guidance in the matter. In *Cham-*

berlain v. Williamson, the converse of the present case occurred in an action brought by the representative of a deceased against a living person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that, except when such special damage had been occasioned, the action was in reality an action arising out of a personal injury. "The general rule of law," says Lord Ellenborough (2 M. & S. at p. 415), "is, *Actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." This judgment has been adopted as a guiding one by the American courts in the cases of *Stebbins v. Palmer*, 1 Pickering (Mass.) 71; *Lattimore v. Simmons*, 13 Sergeant & Rawle (Penn.) 183; *Smith v. Sherman*, 4 Cushing (Mass.) 408, at p. 413; and *Hovey v. Page*, 55 Maine, 142. It does not, indeed, follow that the same reasoning applies *in toto* to actions brought against the executors of a deceased person: see *per* Bramwell, L. J., in *Twycross v. Grant*, 4 C. P. D. 40.

But the decision in *Chamberlain v. Williamson* shows, at all events, that the courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim *Actio personalis* to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions *ex contractu*. In order accurately to draw the dividing line, it becomes necessary to analyse the damages which are recoverable in cases of breach of promise, and their measure and character has nowhere been better explained than in Sedgwick on Damages, vol. ii. p. 146, in a passage cited with approval by Willes, J., in *Smith v. Woodfine*, 1 C. B. N. S. 660, at p. 667. "This action," says the learned author, "is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption will not be allowed to stand. Beyond this the power of the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence, when offered by way of enhancing or mitigating damages." It is, as it seems to us, by way of enhancing damages, and not as a special head of damage flowing naturally from the breach, that evidence of the means of the defendant is usually given at the trial. If it were otherwise, such head of damage would require special averment on the record. But it is treated as part of the history

of the circumstances of the case, and as enabling the jury to estimate properly the conduct of the defendant. "The value of the defendant's property," says Cresswell, J., in *Smith v. Woodfine*, 1 C. B. N. S. at p. 666, "is invariably gone into in cases of this sort." But where there is no special averment on the record of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports, according to Lord Ellenborough, only a personal injury: *Chamberlain v. Williamson*; though the jury may consider such personal injury with reference to all the circumstances of the case.

There may, of course, be an actual loss to the temporal estate of the promisee, arising out of the breach of contract. If such loss is to be relied on as independent and special damage in an action against executors, it ought to be specially pleaded, and in order to see if such damage is in fact recoverable the ordinary line as to remoteness of damages will have to be drawn according to the well-known doctrine of *Hadley v. Baxendale*.

If the above is a correct account of the damages recoverable in an action for breach of promise, it would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss, flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case. In the present action there is no special averment of temporal loss, and we ought not to allow the pleadings at this late stage to be amended, and to send down the case to trial again, unless we are satisfied that there is a substantial claim under this head fit for the consideration of the jury. By special leave of the court, the plaintiff has now filed an affidavit as to particulars of special damage. The only items which are entitled even to plausible consideration are two: first, the expense to which the plaintiff was put in maintaining herself as a *feme sole* subsequently to the breach; and, secondly, the amount expended by the plaintiff in the purchase of underclothing, &c., in preparation for her marriage. The plaintiff's expense in maintaining herself after she was forsaken clearly cannot be recovered. It cannot be a consequence naturally arising out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover. With respect to the claim for underclothing, &c., it is sufficient to say that the materials furnished by the plaintiff's affidavit do not show that such purchase was made under circumstances which would bring the expenditure within the head of damages flowing directly from the alleged breach of contract, or within the contemplation of the parties at the time. We do not desire to intimate any opinion that expenditure in respect of a marriage trousseau or other marriage preparation must necessarily be too remote to be recovered against executors in an action for breach of promise of

marriage—the matter must in each case depend upon the circumstances of the case—but though invited to do so, the plaintiff has not given us the means of seeing that this particular head of damage can be sustained by evidence, or what case she has for asking for an amendment to be made in the statement of claim which would include it. The action, therefore, must be dismissed, with costs; but as the only point taken by the defendants at the trial was one as to corroboration, and as that point was a bad one, we think that there ought to be no costs of the hearing of the Divisional Court or of this appeal.

*Judgment for the defendants.*¹

ARNOLD v. LANIER.

SUPREME COURT OF NORTH CAROLINA.

[Reported 1 Car. Law Repository, 529.]

THE plaintiff declares in deceit, for, that defendant's testator sold to him, as sound, a negro which he knew to be unsound. The defendant pleads that her testator was not guilty, and that she had fully administered, &c. The jury found her testator guilty, assessed damages, and that she had fully administered. It is referred to the Supreme Court to say what judgment shall be entered. The plaintiff wishes to proceed against the real estate.¹

SEAWELL, J., delivered the opinion of the court.

The Act of 1799, chap. 18, § 5, declares that no action of detinue or trover, or action of trespass, where property, either personal or real, is in contest, and such action of trespass is not merely vindictive, shall abate by the death of either party. This is an action of trespass, though not *vi et armis*, and the passions and feelings have no concern. It is, in substance, to recover for an act done by the defendant's testator, whereby he has been made richer, and the present plaintiff poorer.

Wherefore, we are all of opinion that the plaintiff is entitled to judgment, and that *scire facias* be awarded against the testator's heirs and devisees.

¹ See *Wade v. Kalbfleisch*, 58 N. Y. 282 (1874); *Price v. Price*, 75 N. Y. 244 (1878); *Chase v. Fitz*, 132 Mass. 359 (1882).

² See, accord, *Baker v. Crandall*, 78 Mo. 584 (1883); and cf. *Tichenor v. Hayes*, 41 N. J. L. 193 (1879); *Cutter v. Hamlen*, 147 Mass. 471 (1888). But see *Brackett v. Griswold*, 103 N. Y. 425 (1886).

READ v. HATCH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1837.

[Reported 19 Pick. 47.]

THIS was an action on the case, brought by the plaintiffs, merchants in Boston, against the defendant, who resided in Bangor, Maine, charging that the defendant falsely and fraudulently recommended another person as a trader in good credit and worthy to be intrusted with goods, by means of which the plaintiffs were induced to sell him goods on credit, and thereby sustained damage.

At or before March Term 1836, the defendant pleaded in abatement the pendency of an action for the same cause, in the State of Maine; to which plea there was a general demurrer; and the cause then stood for argument.

Subsequently to the 1st of May, 1836 (when the Revised Statutes took effect), the defendant died, and the plaintiffs moved to cite in his administrator.

Morey, for the plaintiffs.

S. D. Parker, as *amicus curiæ*, *contra*.

SHAW, C. J. The question whether the plaintiffs can cite in an administrator and proceed with their action, depends on Revised Stat. c. 93, § 7. It is contended that a false representation, by which one is induced to part with his property, by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction, and not conformable to the intent of the Statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage *done* to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate.

The action is abated at common law, by the death of the defendant, and not surviving by force of the Statute, must be deemed to stand abated.

JENKINS v. FRENCH.

SUPREME COURT OF NEW HAMPSHIRE. 1879.

[Reported 58 N. H. 532.]

ASSUMPSIT. The question reserved was, whether this action could be maintained against the administrators for unskilful treatment of the plaintiff by the deceased.

A. F. L. Norris, for the plaintiff.

Mugridge, for the defendants.

STANLEY, J. The precise point here presented has been decided in *Vittum v. Gilman*, 48 N. H. 416, and we find no good reason to doubt the correctness of that decision.

It is conceded that if the action were in tort it could not be maintained; but the plaintiff claims that, being in contract, a different rule prevails.

The general doctrine, to which this case forms no exception, is, that actions for the redress of personal injuries only do not survive, and this without regard to the form. It is true, as a general proposition, that actions in form *ex contractu* survive, but this is due rather to the substance of the action than to its form. There are actions, such as arise from the negligence of an attorney, or of a coach proprietor, where the plaintiff seeks to recover damages, which survive, but in these the primary cause of complaint is the injury to property and rights of property, and the personal injury is incidental. The line of demarcation, separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental. This distinction is recognized in all the authorities. *Broom Max.* 702; *Com. Dig.* "Administration," B. 15; *Hambly v. Trott*, *Cowp.* 375; *Chamberlain v. Williamson*, 2 M. & S. 408; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408; *Wade v. Kalbfleisch*, 58 N. Y. 282, 285, 287; *Lattimore v. Simmons*, 13 S. & R. 183; *Chitty Pl.* 67, 90; *Bouv. Inst.* 2755, 2756.

In the present case, there is no suggestion of injury to the property or property rights of the plaintiff. Her only complaint is of her personal injuries by the unskilfulness of the deceased, and the action cannot be maintained.

Case discharged.

FOSTER, J., did not sit: the others concurred.¹

¹ See *Boor v. Lowrey*, 103 Ind. 468 (1885).

SECTION II.

PRIORITY OF PAYMENT BETWEEN DEBTS.

NOTE.—The order of paying out the assets is, at common law, as follows: 1. Funeral expenses. 2. Expenses of probate and administration. 3. Debts due to the Crown by record or specialty. 4. Judgments in courts of record. 5. Recognizances. 6. Specialty debts and rent. 7. Simple debts, *semble*, to the Crown. 8. Simple debts. 9. Voluntary bonds. See 1 Wms. Exec. (10th ed.) 751-798.

In the United States the priority of payments has been altered by Statute. The following order is perhaps the most usual: 1. Funeral expenses and expenses of last sickness. 2. Expenses of administration. 3. Debts due to the United States. 4. Debts due to the State. 5. All other debts; in a few States judgments have precedence. The priority of specialty debts has been almost entirely done away with. See 2 Woerner, Amer. Law Adm. (2d ed.) §§ 364-374.

RETAINER. An executor or administrator may prefer any debt over other debts of the same class. If he is himself a creditor of the deceased he may retain goods of the deceased to pay his debt. The leading case on this topic is *Woodward v. Darcy*, Plowd. 184 (1558). See also *Loane v. Casey*, 2 W. Bl. 965 (1776). So an executor may redeem a testator's goods with his own money and retain out of the testator's effects the value of what he pays. *Anon.*, Dyer, 2 a (1514). See also *Anon.*, Ib. 187 b (1560). But such right of preferring himself (or any other creditor) has been greatly modified if not altogether abolished by statute in the United States. See 2 Woerner, Amer. Law Adm. (2d ed.) § 395.

FUNERAL EXPENSES. As to the extent and amount of funeral expenses, see 1 Wms. Exec. (10th ed.) 786-740; 2 Woerner, Amer. Law Adm. (2d ed.) §§ 357-360.

Although the executor has not ordered the funeral expenses, he is liable for them, if reasonable, to the amount of the assets. The action is against him personally. *Tugwell v. Heyman*, 8 Camp. 208 (1812); *Rogers v. Price*, 3 Y. & J. 28 (1829); *Corner v. Shew*, 3 M. & W. 350, 355, 356 (1838). See *Green v. Salmon*, 8 A. & E. 348 (1838); *Ferrin v. Myrick*, 41 N. Y. 315 (1869); 2 Wms. Exec. (10th ed.) 1426-1480. In Massachusetts, the suit is against the executor in his representative capacity. *Hapgood v. Houghton*, 10 Pick. 164 (Mass. 1831). See *Trueman v. Tilden*, 6 N. H. 201 (1833).

ASSETS. The property which is chargeable with the payment of the debts and legacies of a deceased person is called assets. Assets are of two kinds,—legal and equitable. Legal assets are divided into real and personal.

I. LEGAL ASSETS. A. Real. Apart from Statute, an ancestor's estates in fee simple were liable in the hands of the heir, but only for debts by specialty in which the heir was named. By St. 3 & 4 Wm. & M. c. 14 (1691), the liability was extended to such estates in the hands of devisees. By St. 29 Car. II. c. 3 § 12 (1677), a like liability was imposed on estates *pur autre vie* in the hands of the heir as special occupant.

B. Personal. All the property and rights which are in the hands of an executor or administrator, in his capacity as representative, are personal assets. As all the testator's goods and chattels, including all surviving *choses in action*, pass to the executor or administrator, they are all legal assets. And if the executor or administrator, in his capacity as representative, has to go into equity to realize an asset, *e. g.*, to collect a legacy, it is none the less a legal asset. *Cook v. Gregson*, 8 Drew. 547 (1856).

But no real estate is personal assets, except that by St. 29 Car. II. c. 3 § 12, estates *pur autre vie*, where the heir is not named as special occupant, are assets in the hands of the executor or administrator.

II. EQUITABLE ASSETS. The assets of an intestate estate are only legal, but a man may direct by will that his real estate shall go for the payment of his debts generally.

Such real estate is equitable assets. The administration of equitable assets is sometimes committed by the testator to his executors, sometimes to third persons.

The distinction in England between the different kinds of assets was important, owing to the different manner in which they were employed in discharge of debts. Speaking roughly, Legal Real Assets were applicable to the payment of specialty debts only, Legal Personal Assets first to specialty, and afterwards to simple debts; Equitable Assets equally to specialty and simple debts.

In the United States, speaking generally, all a man's property, real and personal, is liable for all his debts. If any debts have precedence, it is without regard to the kind of assets out of which they are paid. The distinction between real and personal, and between legal and equitable assets, if it exists at all, is therefore of slight consequence in this country.

LITTLETON v. HIBBINS.

COMMON PLEAS. 1600.

[*Reported Cro. El.* 793.]

SCIRE FACIAS against executors, upon a judgment against their testator in debt. They pleaded, that before they had any consuance of this judgment, they had fully administered all their testator's goods in paying of debts upon obligations. — And it was thereupon demurred: and, after argument at the bar, adjudged for the plaintiff, that it was not any plea; for they at their peril ought to take consuance of debts upon record, and ought first of all (unless for debts due to the queen, wherein she hath a prerogative) to satisfy them; and although the recovery was in another county than where the testator and executors inhabited, it is not material. But if an action be brought against them in another county than where they inhabit, and before their knowing thereof they pay debts upon specialties, that is allowable. Wherefore it was adjudged accordingly. *Vide* 4 Hen. 6, *pl.* 8. 21 Edw. 4, *pl.* 21.

GOATE v. FRYER.

CHANCERY. 1789.

[*Reported 2 Cox*, 201.]

THE plaintiff Dorothea Goate was the administratrix of her late husband, Alexander Goate, who died in December, 1788, intestate, indebted to several persons, and amongst others to Thomas Wood by simple contract. In Trinity Term last Thomas Wood filed his bill in this court on behalf of himself and all other the creditors of the said Alexander Goate who should come in and contribute to the expense of that suit, against the present plaintiff Dorothea Goate, for a general account of the intestate's personal estate possessed by her, and a dis-

tribution thereof ratably amongst his creditors. To this bill she put in an answer, and submitted to account. The cause was heard on the 30th June, when a decree was made for taking the account, advertising for creditors, and a distribution amongst those who should come in ratably and in proportion to their debts. In Easter Term last, before the filing of Wood's bill, the present defendant, James Fryer, brought an action at law against the plaintiff as administratrix of her husband for goods sold and delivered, to which she pleaded *plene administravit* on the 30th June, being the date of the decree, and immediately afterwards filed this bill, stating the former suit and decree made therein, and praying to be protected thereby, and an injunction to restrain the defendant Fryer from proceeding in his action at law. At a seal after last term the common order for an injunction was obtained for want of an answer. In this term he put in his answer, admitting personal notice of the former decree, but insisting that he had a right to proceed at law, and he gave notice of trial in the action.

Harvey, for plaintiff, now moved that the injunction might be extended to stay trial of the action; and in support of the motion contended that the administration of the whole personal estate being by the decree in the first cause taken into the hands of the court, it would not permit any creditor to take any part of it by an execution at law; that a decree of this court was equal to a judgment at law, and the court would support its own decrees accordingly; that as it was clear the court would never permit the defendant to take out execution, it would give him no advantage to obtain a judgment now, for all the creditors who came in under the decree already made would have a priority in point of time to the defendant's judgment at law. He cited *Martin v. Martin*, 1 Vez. 211. *Kenyon v. Worthington*, July, 1786.

For defendant it was admitted that the court would not permit him to take out execution, but it was contended he ought to be at liberty to proceed to judgment, as then he would be a creditor for his costs as well as his debt.

LORD CHANCELLOR [THURLOW]. It is now the settled rule of the court not to permit any creditor to proceed at law against an executor or administrator after a decree to account and for payment of all debts; for that gives every creditor who carries in a claim equal to that of a creditor by judgment at law from the date of the decree. The court does not take away from a creditor the benefit of such a judgment, if prior to the decree; but it only supports the decree as equal in point of rank to a judgment, and then follows the rule of law in giving preference to the prior debt in point of time. Therefore let the injunction extend to stay trial; but as the defendant's action at law was commenced before the first bill was filed, let the defendant be at liberty, if he shall discontinue his action at law, to prove the costs of the action as a debt under the decree.¹

¹ See *Drewry v. Thacker*, 3 Swanst. 529 (1819).

MALTBY v. RUSSELL.

CHANCERY. 1825.

[Reported 2 S. & St. 227.]

THIS was a creditors' suit. The decree directed the Master to take the usual accounts.

The personal representatives had, subsequently to the filing of the bill, paid several of the testator's debts, one of which was due to a firm in which one of them was a partner. The Master having refused to allow them the sums they had paid in discharge of those debts, they took exceptions to his report.

The exceptions now came on to be argued.

Mr. Sugden, *Mr. Simpkinson*, and *Mr. Girdlestone, jun.*, in support of the exceptions.

Mr. Rose and *Mr. Pemberton*, for the devisees of the real estate.

Mr. Horne and *Mr. Lovatt*, for the plaintiffs.

THE VICE-CHANCELLOR on the argument, expressed a strong opinion in favor of the Master's report, and doubted the correctness of Colles's report of the case of *Lord Orford v. Darston*, Colles, P. C. 229. His Honor, however, took time to consider of the case, and afterwards delivered judgment to the following effect.

THE VICE-CHANCELLOR. [SIR JOHN LEACH]. That an executor should be permitted, after a bill filed for the administration of the assets here, to prefer one creditor to another, breaks in upon the ruling principle, that equality is equity. Even at law, an executor cannot, after an action brought, prefer one creditor to another, unless judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such judgment (which breaks in upon the principle of greater legal diligence), because it is said that he is not bound to charge his testator's estate with costs, by defending the action where he knows the debt to be due.

I find, however, that the case of *Darston v. Lord Orford*, in the House of Lords, is correctly reported; and in *Waring v. Danvers*, 1 P. W. 295, it is expressly referred to as establishing the point that a creditor may give a preference after a suit instituted.

I am bound therefore by this authority to allow the exceptions in this case.

NOTE.

RIGHT OF THE EXECUTOR OR ADMINISTRATOR TO WAIVE THE
DEFENCE OF THE STATUTE OF LIMITATIONS.

IN ENGLAND. If an executor pays a debt justly due from his testator, but barred by the Statute of Limitations, he is not guilty of a *devastavit*, *Lewis v. Rumney*, L. R. 4 Eq. 451 (1867); and in a suit subsequently brought for the administration of the estate such payment will be allowed him, *Hunter v. Baxter*, 3 Giff. 214 (1861), even against the devisees of the real estate upon whom other debts are in consequence thrown, *Lewis v. Rumney*.

But an acknowledgment by an executor will not keep a debt alive so that it can be proved directly against an heir or devisee, *Putnam v. Bates*, 3 Russ. 188 (1826). See also *Briggs v. Wilson*, 5 De G. M. & G. 12 (1854). And in *Fordham v. Wallis*, 10 Hare, 217 (1852), it was held that a simple contract debt which had been kept alive against the personalty by the conduct of the executors, was not entitled under the doctrine of marshalling to stand in the place of specialties against the real estate; but this seems opposed to *Lewis v. Rumney*; and see *Darby & Bos. Sta. of Lim.* 87-90.

An executor may retain a debt due to himself from the testator though barred by the Statute, *Hill v. Walker*, 4 K. & J. (1858); and this right is not lost by failure to assert it before a decree in an administration suit, *Stahlschmidt v. Lett*, 1 Sm. & G. 415 (1853).

But after decree in an administration suit, the executor, except as to his own debt, loses his right to waive the defence of the Statute, *Phillips v. Beal* (No. 2), 32 Beav. 26 (1862); and the defence or the Statute may be insisted upon, either by the residuary legatee, *Shewen v. Vanderhorst*, 1 Russ. & Myl. 347 (1831); *Moodie v. Bannister*, 4 Drew. 432 (1859); or by another creditor, *Fuller v. Redman* (No. 2), 26 Beav. 614 (1859). But if the administration suit has been brought by a creditor, the plaintiff's debt is not open after decree to an objection that it is barred under the Statute, made either on behalf of the residuary legatee, *Briggs v. Wilson*, *ubi sup.*, or of a creditor, *Fuller v. Redman* (No. 2).

But in an administration suit, if neither the executor nor any one beneficially interested in the estate interpose the bar of the Statute to any claim, the court will not interfere *mero motu*, *Alston v. Trollope*, L. R. 2 Eq. 205 (1866). And in *Combs v. Combs*, L. R. 1 P. & D. 288 (1866), administration was granted to a creditor whose debt was barred by the Statute.

IN AMERICA. The matter is very much affected by the Statutes for settling estates. In some States, the executor can waive the bar of the Statute of Limitations. *Walter v. Radcliffe*, 2 Desaus. 577 (So. Car. 1808); in others not, *Peck v. Botsford*, 7 Conn. 172 (1828). In some States it is held that he cannot waive the defence if the claim is barred at the time of his appointment, but can, if it has not become barred till afterward. *Byrd v. Wells*, 40 Miss. 711 (1866); *Seig v. Acord*, 21 Grat. 365 (Va. 1871). See *Smith v. Pattie*, 81 Va. 654 (1886); *Holly v. Gibbons*, 176 N. Y. 520, 526 (1903).

And it has been sometimes held, contrary to the English cases *supra*, that an executor cannot retain for a debt from the testator to himself which is barred by the Statute. *Rogers v. Rogers*, 3 Wend. 503 (N. Y. 1829); *Hoch's Appeal*, 21 Pa. 280 (1853).

As in England, it has been held in North Carolina, that on a creditor's bill for the administration of an estate, any creditor can interpose the objection of the Statute to the claim of any other creditor. *Wordsworth v. Davis*, 75 N. C. 159 (1876).

So, in Pennsylvania, on proceedings in the Orphans' Court, *Kittera's Estate*, 17 Pa. 416 (1851). But cf. *Ritter's Appeal*, 23 Pa. 95 (1854).

And the law seems to be the same on the settlement of estates in New York, *Matter of Kendrick*, 107 N. Y. 104 (1887); and cf. *Partridge v. Mitchell*, 3 Edw. Ch. 180 (1838).

On an application however to sell land for the payment of debts, the heir or devisee is not bound by an executor's waiver of the defence of the Statute, and this not only in New York and North Carolina, *Moers v. White*, 6 Johns. Ch. 360 (1822); *Beyers v. Park*, 88 N. C. 456 (1833), but also in States, e. g. Alabama, where it would seem that the executor has entire control of the defence of the Statute as to the personal assets, *Steele v. Steele*, 64 Ala. 438 (1879).

But in some States the heir is bound by the executor's waiver, *Hodgdon v. White*, 11 N. H. 208 (1840); *Trimble v. Marshall*, 66 Iowa, 233. And even in North Carolina, if a judgment has been obtained in a suit against an administrator, the heir is bound by it, in the absence of fraud, though the administrator might have pleaded the Statute in the suit, but did not, *Speer v. James*, 94 N. C. 417 (1886).

See 2 Woerner, Amer. Law Adm. (2d ed.) § 401.

In most of the States, there are Statutes requiring claims to be presented against the estates of deceased persons within a certain time, and generally executors have no power to waive these special Statutes of Limitation. 2 Woerner (2d ed.) § 400.

SECTION III.

PRIORITY OF DEBTS TO LEGACIES.

A. In General.

SIMMONS v. BOLLAND.

CHANCERY. 1817.

[Reported 3 Merr. 547.]

By indenture of lease dated the 23d of July 1798, the mayor and commonalty of Canterbury demised to Simmons (one of the aldermen of their corporation), his executors, administrators, &c. for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c. on non-performance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

Simmons, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the defendant Bolland and another (whom he also appointed his executors), upon trust to sell; and after payment thereof of debts and legacies, to invest the produce in their

names upon certain trusts, subject to which he gave the entire residue of his estate to the plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1,000 from the mayor and commonalty of Canterbury, under their common seal, to the testator; and a sum of £800, 5 per cents, which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of Simmons deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the defendant was advised he was liable to under the said indenture;" and had actually then lately received a notice to that effect from the corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the corporation also extended.

Sir S. Romilly and Wilbraham, for the plaintiff.

Cooke and Combe, for the defendant.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The equitable relief sought in this case depends upon a legal question, whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles v. Lambert*) reported both by Styles and by Ayleyn (Styles, 37, 54 73; Ayleyn, 38 s. c.), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector and Sharp v. Gennet*, in Cro. Eliz. 466, where the same question arose, though in a different shape. A legatee sued in the ecclesiastical court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount

exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation. Upon this the principal question was, whether the escape was such that the sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole court agreed, and determined that it was no plea, unless the obligation were forfeited. Coke said, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty *maintenant*, which is in the condition (as 9 E. 4, 12). But otherwise it is, where a Statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual court to proceed according to their own established course,—namely, to compel the legatee to give security to refund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of *Eeles v. Lambert*, this case is noticed by Rolle, Justice: "It was *Nector and Sharpe's Case*, 38 Eliz. that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." (Styles, 56.)

In *Hawkins v. Day*, Amb. 160, Lord Hardwicke makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of Ambler's report of this case; for his statement is found to correspond with the Register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord Hardwicke stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects."

In this state of the authorities, it would be too much for me to order

the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be made over on the plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security.

GILLESPIE v. ALEXANDER.

CHANCERY. 1826.

[*Reported 3 Russ. 130.*]

IN this suit, which was instituted for the administration of General Gillespie's estate, the original decree, made on the 15th of November 1820, directed, among other things, the usual accounts of his assets, and of his debts and legacies. On the 23d of March 1823, the Master made his report; in which he certified, that several creditors had come in before him and proved their debts, amounting in the whole to £269 19s. 2d. By an order, made on the 15th of April 1823, directions were given for paying the debts reported due; and they were accordingly paid. The decree on further directions, made on the 12th of January 1825, after ascertaining the rights of the parties, providing for the payment of the costs, and reciting that the creditors of the testator had been paid their respective debts set forth in the schedule to the Master's report, ordered, that the residue of the fund in court, and also the bank annuities which should be purchased in pursuance of the directions therein contained, should be apportioned among the legatees and the annuitants, except such of them whose legacies might appear to have been paid; and such apportionments, when appropriated in the manner therein directed, were to be considered as in discharge of the several legacies, so far as the value of such apportionments should extend. There was also a direction, that the executors should be allowed the sums which they had paid in discharge of legacies.

In November 1825, Alexander Lean, claiming to be a creditor of General Gillespie, petitioned to be at liberty to go in and prove his debt; and that so much of a sum of £14,177 16s. 9d. three per cent bank annuities, then standing in the name of the accountant-general, to

the credit of the cause, as might be sufficient to raise the sum which should be reported due to him, might be sold for payment of his demand. On the 29th of November 1825, an order was made, that he should be at liberty to go in and prove such debt, he paying the costs of the petition and of the proceedings before the Master. On the 26th of July 1826, the Master reported that £1,636 1s. 5d. was due to the petitioner from the estate of General Gillespie.

In the mean time, about December 1825, the fund in court had been apportioned by the Master among the annuitant and the unsatisfied legatees; and part of it was paid out in discharge of some of the legacies. A few of the legacies had been paid long before; and those payments, though not made under the authority of the court, had been directed to be allowed to the executor by the decree of January 1825.

Lean then presented a petition, stating, that, pending his proceedings in the Master's office, the parties had proceeded to make the apportionment under the decree on further directions; and that there were standing to the credit of this cause the following sums of three per cent consolidated bank annuities:—

To the plaintiff, the annuitant's account	£5,045	18	4
To Selina Gillespie's account	4,863	10	8
To the account of the two children by the Malay girls	426	12	10
Four and Leary's account	90	3	6
Total	£10,426	5	4

The prayer was, that the report might be confirmed; that the Master might be ordered to apportion to Lean as much of the several sums, standing in the name of the accountant-general to these several accounts, as should be sufficient to satisfy his debt of £1,636 1s. 5d.; and that the accountant-general might be directed to sell so much of the bank annuities so apportioned, as would be sufficient to pay the demand.

All these sums, except that carried to the annuitant's account, had been kept in court by reason of the infancy of the persons entitled to them, or their residence in a foreign country.

Mr. Tinney, in opposition to the petition.

Mr. Pemberton, contra.

THE MASTER OF THE ROLLs. [SIR JOHN SINGLETON COPLEY.] It is said, it was the duty of the creditor to have applied to the court, in order to prevent any of the legacies from being paid, till his demand was satisfied; but I do not see why the *onus* of protecting the fund should be thrown on him. He is entitled to have his debt paid; and it must be apportioned among the funds of the different legatees, whose legacies still remain in court. Those legatees are not without their remedy: they can call on the other legatees to contribute.

The order of the Master of the Rolls confirmed the report, and directed the debt to be apportioned among the four sums of stock remaining in court, and to be paid by the proceeds of a proportionable part of each of the four sums.

From this order the infant, Selina Gillespie, appealed.

The petition stated, that there was still considerable outstanding personal estate of the testator, which was in the course of being gotten in; and it insisted, that Lean ought not to receive any part of his debt out of the four sums carried over to particular accounts, but only out of any outstanding estate which might be gotten in; that, at all events, it was unjust to throw the whole of the debt upon persons, whose funds, though definitively appropriated to them, had, from accidental circumstances, remained in court; and that the funds so appropriated, if chargeable at all, ought to be charged only with a proportion of the debt, according to the ratio which those funds bore to all the annuities and legacies bequeathed by the testator. The prayer was, that the order of the Master of the Rolls might be reversed; that Lean might not receive any part of his debt out of the appropriated funds set apart for Selina Gillespie; that, at any rate, the whole of the debt might not be paid out of the four sums set apart for Selina Gillespie, the annuitant, the two children by the Malay girls, and Four and Leary, but only such part thereof as should be just, regard being had to the proportion which that annuity, and those three legacies, bore to the other legacies bequeathed by the testator; and if any part of the sum apportioned in respect of Selina Gillespie's legacy should be paid to the creditor, then that provision might be made for making the same good to her, out of any outstanding or future personal estate of the testator, which might be gotten in.

Mr. Hart and *Mr. Tinney*, for the appellant.

Mr. Heald and *Mr. Pemberton*, contra.

THE LORD CHANCELLOR [ELDON]. Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

The present case is involved in much singularity. Previously to January 1825, several of the legacies had been paid by the executor;

and the order of January 1825 is a judgment of the court in favor of the executor, with respect to these payments, — a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following November the creditor makes his application: the court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In December, 1825, the Master makes his report, and appropriates the fund in court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the court was not, that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees, if he had applied before the other legacies were paid, and that he should be left to recover the residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie, of enforcing contribution against the other legatees?

LORD ELDON had not delivered a final judgment, when he resigned the great seal; but, after he quitted office, the parties having consented to be bound by his opinion, he gave the following decision: —

“ My memory does not furnish me with the recollection of any case alike to this. It may, therefore, not be improper that this should be brought before the court again, and spoken to by counsel; after they have endeavored to find a precedent or precedents for such an order as that complained of.

“ If no precedent to the contrary — that is, no precedent in support of the order — can be cited, I am of opinion, that, — although, if the fund carried to the account of a legatee was residue, after the payment of debts and legacies, the creditor would be entitled to be wholly paid, — yet, if adult legatees are paid, and, on the other hand, legatees, who are infants or have only partial interests, are not paid, but have funds carried to their account, such last-mentioned legatees ought to be considered, as between themselves and a creditor not coming in sooner, as not liable to pay him wholly out of what is so carried to their account, but only to pay him a due proportion of the debt; and that he must seek the payment of the rest of his debt, in proper proportions, against those who have been actually paid. I think, therefore, this order must be altered, and the creditor take only such a proportion; leaving the creditor at liberty to apply, as he shall be advised, against other lega-

tees paid, and against funds which may yet come in ; and leaving these petitioners also at liberty to apply, as they may be advised, against funds which may yet come in.

“If a precedent can be found to the contrary, that precedent must support the order as made.”

The minutes of the order declared, that Alexander Lean was not entitled, as against the plaintiff, the annuitant, and the legatees, — in respect of whose annuities and legacies the several sums of bank annuities had been carried over, as in the petition of appeal mentioned, — to be paid the whole of his debt and interest proved before the Master, but only such proportion thereof as the value of the annuity, and the amount of such legacies, bore to the amount of the other legacies bequeathed by the testator's will, which had been paid. It was referred to the Master to ascertain the contributive portion of the debt and interest, which ought to be paid out of each of the four sums of bank 3 per cent annuities, standing in the name of the accountant-general, to the four several accounts before mentioned : directions were then given for raising out of the sums standing to each account its contributive proportion of the debt : and it was ordered, that Alexander Lean should be at liberty to apply to the court, as he might be advised, against such of the legatees as had received payment on account or in satisfaction of their respective legacies ; and that he and the annuitant and legatees, in respect of whose annuity and legacies the aforesaid four several sums had been carried over, should be at liberty to apply to this court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.¹

NORMAN v. BALDRY.

CHANCERY. 1834.

[*Reported 6 Sim. 621.*]

ON the marriage of William Baldry with Ann Freston, he, together with Simon Baldry, executed a joint and several bond, dated the 7th of October, 1802, to W. Lewis, conditioned for the payment, by the heirs, executors or administrators of William Baldry, within three months after his decease, of £490 to Ann Freston, in case she should

¹ See *David v. Frowd*, 1 Myl. & K. 200 (1833).

survive him; but, in case she should die in his lifetime, then for the payment by him, of £200 within six months after the death of Ann Freston, to the persons therein named.

Simon Baldry died in March, 1820. Ann Baldry died in April, 1831, leaving her husband her surviving.

William Baldry having become insolvent, the persons entitled to the £200 under the bond, filed, in 1832, a creditor's bill against the executors of Simon Baldry.

The executors, in their answer, said that they had applied the whole of Simon Baldry's personal estate in payment of his debts *and legacies*: and that they never heard of the bond until October, 1831.

Mr. Knight and *Mr. Spence*, for the plaintiffs.

Sir E. Sugden and *Mr. Thomson*, for the defendants, the executors of Simon Baldry.

Mr. Bridger and *Mr. Bichner* appeared for other defendants.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL] said that he had always understood the law to be that an executor who had paid simple contract creditors of his testator, a bond being in existence but not then payable, ought to be allowed those payments; but that an executor was liable, if he paid the legatees, notwithstanding he had no notice of the bond: and that he was not disposed to agree to what was attributed to Lord Kenyon in the case cited.¹

WALLER v. BARRETT.

CHANCERY. 1857.

[Reported 24 Beav. 413.]

THE testator Scarman died in 1816, having, by his will, given his property to his wife for life, and afterwards on trust for his three daughters and their children. His executors proved his will.

The testator, at his death, was possessed of some leaseholds, and by the decree made in 1854, in a suit for the administration of his estate, an inquiry was directed "whether the testator's estate and effects, or his personal representative, were subject to any and what liabilities in respect of his leasehold estates, and whether any and what indemnity against such liabilities ought to be provided or made, and in what manner."

The chief clerk's certificate found, that the testator was, at the time of his death, assignee of a lease, dated the 28th of February, 1793, granted by lessees under the city of London to James Melvin, of a house and premises, No. 68, New Bond Street, for a term of ninety

¹ *Chelsea Water-works Co. v. Cowper*, 1 Esp. 275 (1795), which must now be considered as overruled. See *Spode v. Smith*, 8 Russ. 511 (1827); *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122 (1837).

years, which would expire at Midsummer, 1883, at the yearly rent of £78 15s.

The lease contained covenants by the lessee to pay the rent and taxes, to insure the premises against fire, to rebuild in case of fire, to keep the premises in repair, not to carry on any noisome or offensive trade, &c. And by the assignment the testator covenanted to pay the rent, to perform the covenants of the original lease, and to indemnify the assignor, his heirs, &c., against such rent and covenants, and all actions, &c., damages, costs, by reason or means thereof, or the non-payment or non-performance thereof.

The testator had underlet this property for a term which would expire at Christmas, 1872, at the yearly rent of £105, being an improved rent for the house and premises of £26 5s. per annum.

The testator was also, at the time of his death, assignee of a lease, dated 21st October, 1793, of the stables, &c., at the rear of the house in New Bond Street, from Lady-day, 1809, for a term which would expire in 1883, at the yearly rent of £13 13s. This was underlet at a total improved rent of £63 7s. a year. This lease contained similar covenants, and the testator had entered into the like covenants to indemnify his assignor.

By an order in this suit, made in 1854, the leaseholds were ordered to be sold. They were accordingly sold and assigned to the purchasers, who covenanted, in the usual way, to indemnify the assignor and the estate of the testator against the rent and the covenants in the original lease.

The residue of the testator's estate now undisposed of consisted of a sum of £755 £3 per cents in court, and £308 £3 per cents in the names of the legal personal representatives.

The chief clerk found that "the indemnity given by the respective purchasers of the testator's leasehold estates by the assignments, together with a recognizance to be entered into by the parties beneficially entitled to the testator's personal estate, to refund, as the court should direct, any part of such personal estate which the court might order to be paid to them respectively, in the event of any claim being hereafter established against the estate and effects of the testator, or against his personal representatives, in respect of such contingent liabilities, would be a proper and sufficient indemnity against the said contingent liabilities."

The defendants, the executors of the last surviving executrix of the testator, took out a summons to vary the certificate, by finding that the above sums or a competent part thereof ought to be retained and set apart as an indemnity against the liabilities, or that some other proper and sufficient indemnity might be provided against them.

Mr. Selwyn and *Mr. Sheffield*, in support of the adjourned summons *Mr. R. Palmer* and *Mr. Martelli* were not called on.

THE MASTER OF THE ROLLS. [LORD ROMILLY.] I have read through these papers, and have considered the question with some pains. The

title is involved, but I am of opinion, upon the facts of this case, that sufficient indemnity is afforded to the executors by the certificate. The only way in which the executors, or the testator's estate, could be affected, would be by an action brought by the ground landlord; and upon the facts of this case, it would be obviously more for his interest to eject the persons in possession, than to bring any action on the covenants. I am, therefore, of opinion, that the proposed indemnity is sufficient.

I think it necessary to make one or two further observations. I wish to express the view which I take of these cases, in order not only that it may be clearly understood, but that if it be wrong, my judgment may be set right in another place. The view I take of these cases is expressed in *Dean v. Allen*, 20 Beav. 1, and which is this: that where executors have fairly placed all the circumstances before the court, and act under its orders, they will be indemnified against all future liabilities. I will refer to one or two authorities on the subject, in order to make the grounds on which I proceed plain. In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the court having administered the assets protects the executors against all future claims. The creditor, however, is not left without his remedy, but that remedy is not against the executor. That principle is so fully established in this court, that it is unnecessary to cite many authorities on the subject; but this is what Lord Eldon says in *Gillespie v. Alexander*, 3 Russ. 136, on the subject: "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund, he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

The *dicta* and authorities on this are exceedingly numerous. They are to be found in *Brooks v. Reynolds*, 1 Bro. C. C. 183; *David v. Frowd*, 1 Myl. & K. 200; *Williams v. Jones*, 10 Ves. 77; and in *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122, in which Lord Cottenham makes these observations: "Where an executor passes his accounts in this court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in court, he does it at his own risk." That is the principle upon which the court proceeds in such cases. So in *Low v. Carter*, 1 Beav. 431, Lord Langdale makes this observation: "It is to be regretted, that the jurisdiction of the court, in such cases, cannot be exercised at a less expense, but when we so frequently see suits instituted against executors, after a considerable lapse of time, and find them held personally responsible for acts done by them in

mistake, but with the most honest intention, the necessity of giving them every opportunity of exonerating themselves by passing their accounts in this court is obvious." These are only some of the observations to which it is possible to refer, to show that in the case of an existing debt the executors are perfectly exonerated, if they bring all the facts which are within their knowledge before the court, and pay away the assets under its direction.

I am at a loss to conceive on what principle a debt which may arise hereafter, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time, he may be ignorant of the whole proceeding, and yet if he do not come in and claim, his only remedy in this court is against the legatees. In the case of *March v. Russell*, 3 Myl. & Cr. 31, Lord Cottenham made this observation: "Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee." I hold that this, in fact, is the principle which governs these cases; that it is for the purpose of giving a greater degree of security to the executor (in case a creditor should arise hereafter), that the court requires what is called "an indemnity to the executor" to be given; but if he has stated the facts to the court, and has acted under its direction, I apprehend that his indemnity is complete and perfect, so far as he is concerned.

In *Fletcher v. Stevenson*, 3 Hare, 360, 370, Sir James Wigram, who certainly took very great pains with these cases, makes these observations, in a case in which he ordered a sum of money to be retained in court as an indemnity: "So far as the executor is personally concerned, he would, I apprehend, be safe in acting under the direction of the court, but in considering what degree of protection is due to the absent covenantee, I am bound to consider, whether the court, taking the fund out of the hands of the executor, can do less than it would expect the executor to do if the fund remained in his hands." In that case he ordered a sum of money to be retained in court, but stated that to be the principle on which he proceeded. In *Dean v. Allen*, I made the same observations and referred to those cases, stating that it appeared to me, that if the executor acted under the direction of the court, and laid everything he knew fully and fairly before the court, he would be protected for the future, and that the court would prevent him from being sued and from sustaining any injury, in case a creditor should afterwards arise.

There are some *dicta* on the point which would perhaps bear a different construction, but I am unable to find any *dictum*, and certainly no decision, which bears directly against that view of the case, and which

appears to me to be the principle and good sense of the matter. In *Dean v. Allen*, the case of *Simmons v. Bolland*, 3 Mer. 547, was referred to, where Sir William Grant says that the decree of the court is no protection to the executor, but Mr. Beavan has given, in a note, 20 Beav. 5, as I think, the proper answer to that observation: "It appears from the argument in *Simmons v. Bolland*, that that suit was not for the general administration of the estate, and this circumstance might therefore justify the observations of Sir William Grant, that the decree would not protect the executors."

This must be guarded against in my observations: I do not mean to say, that where an executor is ordered to pay a sum of money, in a suit which is not for the administration of the assets, it will protect him from creditors. But, I apprehend, that if, in a suit for the administration of assets, the court orders him to pay the money, that is a perfect security to him personally; for unless that were so, it would paralyze the functions of this court. This court in fact acts on the same principle with respect to non-existing debts which may hereafter arise, as it would in the case of existing debts not proved. The indemnity given is only for the sake of effecting a security, in case the court sees a reasonable probability that a creditor who is now unable to establish his case may afterwards come forward. My opinion does not interfere with, but rather carries out, although in a different form, that which Lord Cottenham, in *March v. Russell*, stated was the old practice.

This being the view which I take of these cases, I have thought it desirable to state it, although it does not at all affect my judgment in this particular case, which proceeds on the facts. I think they afford a sufficient proof that the ground landlord would proceed by ejectment rather than by an action of covenant against the original lessee, by which alone this testator's assets could be affected.

I think the case of the executors fails and that the chief clerk's certificate must be confirmed.¹

¹ See *Bennett v. Lytton*, 2 J. & H. 155 (1860); *Dodson v. Sammell*, 1 Dr. & Sm. 575 (1861); *Williams v. Headland*, 4 Giff. 505 (1864).

"It is difficult to see why the executor should require, or the court should provide, any indemnity beyond the indemnity of the decree. It seems to me an anomaly to set apart any portion of the assets on the ground of indemnifying the executor or administrator.

"With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher v. Stevenson*, 3 Hare, 360, the Vice-Chancellor Wigram thought that although the decree of the court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King v. Malcott*, 9 Hare, 692, the Vice-Chancellor Turner decided that there was no such equity, and dismissed a bill filed by the lessor to enforce it; and this seems to determine that the covenantee's right to protection is a ground that cannot be maintained." — *Per KINDERSLEY, V. C.*, in *Dodson v. Sammell*.

BASSETT v. DREW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1900.

[Reported 176 Mass. 141.]

CONTRACT, to recover a balance of \$1,600 with interest due on a promissory note for \$4,000 against the devisee in trust under the will of Russ B. Walker, the maker of the note. Writ dated August 29, 1898. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The note was payable to the order of the plaintiff, dated March 18, 1893, on five years' time, and secured by a mortgage on real and personal property, which on the same day the plaintiff had conveyed to him. Subsequently Walker sold the equity to one who after Walker's decease conveyed it to Walker's widow. Walker died on August 25, 1894, and his widow was appointed administratrix with the will annexed of his property in Maine, where he had lived. She took out ancillary administration in Massachusetts, giving bond in the Probate Court of Suffolk County on May 2, 1895, and published notices of her appointment in compliance with the law.

The property of the deceased in Maine realized \$1,159. His property in Massachusetts consisted of real estate appraised at \$8,600, and a small amount of personal property. By his will he gave all his property, after payment of a few small legacies, to the defendant in trust.

On July 27, 1897, more than two years after giving bond, the administratrix filed her final account in Suffolk County, and about the same time filed one in Maine. Both accounts were then allowed and the settlement of Walker's estate was complete.

The plaintiff never presented this note to the Probate Court. On November 27, 1897, as Walker's widow, who then held the equity, had made default in payment of interest on the note, the plaintiff foreclosed his mortgage under the power of sale, and purchased the premises himself for \$2,600.

This action is to recover the difference between the amount for which the plaintiff had bought in the mortgaged premises and the amount of the mortgaged note.

C. F. Chamberlayne, for the plaintiff.

H. M. Burton, for the defendant.

HAMMOND, J. It is recited in the preamble to St. 1788, c. 66, that theretofore executors and administrators had frequently suffered "great loss and trouble by reason of demands brought against them after they have closed their accounts of administration, and settlement of the estate they have administered is made among the heirs or devisees," and that "for remedy whereof, as well as for the more speedy settlement of estates," the statute is passed.

Prior to this statute there does not seem to have been any statute of limitations applicable only to claims against executors and administrators. See Dane, Abr. c. 29, art. 1. This statute set a time within which actions must be brought against an executor or administrator. It divided the obligations of the deceased into three classes: First, those due and payable within that time; second, those due and not payable within that time; third, all other obligations, including those where the liability depends upon some contingency not happening within that time, and which might never happen.

A claim of the first class not presented within the time was barred, and there could be no recovery against anybody. A holder of a claim of the second class could file his claim in the office of the Probate Court before the expiration of the time, and the judge of probate was directed thereupon to order the executor or administrator to retain in his hands assets to answer the demand unless some one or more of the heirs or devisees should give sufficient security for the executor or administrator to respond to the demand. And in such case the executor or administrator was not allowed to hold the assets, and the remedy was against the estate of the deceased in the hands of the heirs or devisees or their heirs or assigns.

With certain changes and amendments not material to this discussion the policy thus adopted has continued to the present time. St. 1791, c. 28. St. 1792, c. 33. Rev. Sts. c. 66, §§ 3, 5; c. 70, §§ 13, 14. St. 1852, c. 294, § 1. Gen. Sts. c. 97, §§ 5, 8; c. 101, §§ 31, 32. Pub. Sts. c. 136, §§ 9, 13, 26, 27.¹

¹ Mass. Pub. Sts. c. 136 §§ 9, 13, 26, 27, provided as follows:

"SECT. 9. No executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust, except as hereinafter provided."

"SECT. 13. A creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the probate court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of his claim in case it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid. This section, so far as it relates to claims to become due, shall not apply to or affect any estate which was in process of settlement on the twenty-eighth day of February in the year eighteen hundred and seventy-nine."

"SECT. 26. After the settlement of an estate by an executor or administrator, and after the expiration of the time limited for the commencement of actions against an executor or administrator by the creditors of the deceased, the heirs, next of kin, devisees, and legatees of the deceased shall be liable, in the manner provided in the following sections, for all debts for which suits could not have been brought against the executor or administrator, and for which provision is not made in the preceding provisions of this chapter."

"SECT. 27. A creditor whose right of action accrues after the expiration of said time of limitation, and whose claim could not legally be presented to the probate

In speaking of this policy and the statutes, *Shaw, C. J.*, in *Hall v. Bumstead*, 20 Pick. 2, 3, says: "In this Commonwealth, the liability of heirs for the debts of an ancestor, depends wholly upon statute, and is provisional only. . . . Here, it is the policy of the law to make all property liable for all the debts of the deceased owner, and in the first instance to place it under the administration of an executor or administrator; and in pursuance of the same policy, land is made assets provisionally in the hands of the administrator, after the personal property is applied." And again, in the same case, on page 6, he says: "By the policy and provisions of our laws, the remedy of a creditor upon the heirs or devisees of a deceased person, is extremely limited. Every demand which can be made and enforced against the estate of a deceased person, is to be pursued against the administrator where it can be done, and the whole estate, personal and real, is in effect made assets in his hands to meet such claims." See also *Royce v. Burrell*, 12 Mass. 395.

In *Pratt v. Lamson*, 128 Mass. 528, it was held, in accordance with the plain reading of the statute, that a promissory note maturing after two years from the time of the giving of the bond by the executor is a debt for which provision is made under Gen. Sts. c. 97, § 8, now Pub. Sts. c. 136, § 13, and that the creditor not having presented his claim to the Probate Court, under that section, could not maintain an action thereon under Gen. Sts. c. 101, § 31, against the legatees of the deceased. That case is decisive of this unless a distinction can be made in favor of the plaintiff.

The plaintiff, however, contends that where the personal assets do not appear to be sufficient to pay the claim, or where they are merely nominal, it would be useless to order the administrator to do that which he cannot do; that therefore an application under § 13 would be a useless and idle ceremony which the law would not require; and that as the claim could not thus be paid in full it is a claim "for which provision is not made in" the thirteenth section, and so is within Pub. Sts. c. 136, §§ 26, 27; and in support of his position he relies upon *Clark v. Holbrook*, 146 Mass. 366, and *Forbes v. Harrington*, 171 Mass. 386, but in neither of these cases was the question involved. Such a view of the thirteenth section arises from a misconception of the object and legal effect of the proceedings under it.

court, or whose claim, if presented, has not been allowed, may, by action commenced within one year next after the time when such right of action accrues, recover such claim against the heirs and next of kin of the deceased or against the devisees and legatees under his will, each one of whom shall be liable to the creditor to an amount not exceeding the value of real or personal estate that he has received from the deceased. But if by the will of the deceased any part of his estate or any one or more of the devisees or legatees is made exclusively liable for the debt in exoneration of the residue of the estate or of other devisees or legatees, such provisions of the will shall be complied with, and the persons and estate so exempted shall be liable for only so much of the debt as cannot be recovered from those who are first chargeable therewith."

Cf. Mass. Rev. Laws, c. 141 §§ 9, 13, 26, 27.

The object of the proceedings under that section is not to collect the claim presented, for it has not yet become payable, nor even to adjudicate finally the question of its validity, (Pub. Sts. c. 136, §§ 14, 27,) but simply to extend the time for its collection beyond the time within which otherwise by the special statute of limitations it would be barred.

Upon such an application, if it appears to the court that the claim is or may become justly due, the court "shall order the executor or administrator to retain in his hands sufficient to satisfy the same." But if a person interested in the estate offers to give a sufficient bond to the alleged creditor for the payment of the claim "in case it is proved due," the court may order such bond to be taken instead of requiring assets to be retained as aforesaid. Section 15 provides that the action shall be brought against the administrator if he has been required to retain assets, otherwise upon the bond.

If the order to retain assets is passed, and in the action against the administrator judgment is recovered by the plaintiff, execution issues therefor against the estate of the deceased, real and personal, in the hands of the administrator, just as in the case of a suit upon an ordinary claim within the two years, and the real property belonging to the estate is assets in his hands for that purpose; and, if the personal assets in his hands are insufficient to satisfy the claim, it is his duty to apply for license to sell and to sell real estate, and to apply the proceeds or so much thereof as may be necessary to the satisfaction of the claim. If the Probate Court refuses to order assets to be retained or a bond to be given, then the creditor, by the plain reading of Pub. Sts. c. 136, § 27, can hold the heirs or devisees answerable, because it is then a case where the claim has been presented under the thirteenth section, and has not been allowed.

An order under § 13 to hold assets, even if there be no personal assets in the hands of the executor or administrator, is not without effect. On the contrary, the legal effect is to hold the executor or administrator answerable for the claim beyond the special statute limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim. It puts the creditor upon the same ground with reference to the real estate of the deceased as one who has brought suit within the two years. *Hall v. Bumstead*, 20 Pick. 2. *Bacon v. Pomeroy*, 104 Mass. 577. *Edmunds v. Rockwell*, 125 Mass. 363. *Hammond v. Granger*, 131 Mass. 351.

In proceedings before the Probate Court under this thirteenth section, "the duty of that court does not involve an inquiry into the present amount of assets, but is limited to examining whether the claim appears to be justly due from the estate, and, if it does so appear, ordering sufficient assets to be retained, or a sufficient bond to be given, for the payment or satisfaction of the claim if subsequently proved to be due in an action at law." Gray, C. J., in *Hammond v. Granger*, 131 Mass. 351, 353.

The case cannot be distinguished from *Pratt v. Lamson*, *ubi supra*, in any respect material to the questions involved in the present inquiry, and it must therefore follow that case.

*Judgment for the defendant affirmed.*¹

B. *Refunding.*

ANONYMOUS.

CHANCERY. 1683.

[*Reported* 1 Vern. 162.]

A. BEING indebted unto B. makes C. his executor. C. wastes the estate and dies, and makes D. his executor, and by his will devises several legacies. D. pays the legacies. B. exhibits a bill against D., the executor of C., for his debt due from the first testator, and against the legatees in the will of C., to compel them to refund their legacies, there not being now sufficient assets of the first testator.

*Decreed that the legatees should refund.*²

DAVIS v. DAVIS.

CHANCERY. 1718.

[*Reported* 8 Vin. Abr. 423, pl. 35.]

BILL by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the *assets falling short to satisfy the testator's debt*. Decreed that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund, *contra* to the opinion in 2d Vent. 858. *Noell v. Robinson*, and 2 Vent. 360. *Hodges v. Waddington*. *Per* JERKILL, M. R. MS. Rep.

¹ See 2 Woerner, Amer. Law Adm. (2d ed.) § 394.

² See *March v. Russell*, 3 Myl. & Cr. 81 (1837); *Davies v. Nicolson*, 2 De G. & J. 693 (1858). That a creditor may, by acquiescence or laches, lose the right to have a legatee refund, see *Ridgway v. Newstead*, 2 Giff. 492 (1860).

ZOLLIKOFFER v. SETH.

COURT OF APPEALS OF MARYLAND. 1876.

[Reported 44 Md. 859.]

ALVEY, J., delivered the opinion of the Court.¹

The questions in this case arise upon a demurrer to the complainant's bill, and by the demurrer the facts alleged are admitted to be true. If, therefore, the bill discloses a case to entitle the complainant to relief, the decree appealed from must be reversed, and the cause remanded for further proceedings in the Court below.

The right of the complainant to recover from the defendants, or any of them, will depend upon the decision of the two following propositions:

1. Whether, by reason of the death of McHenry Grafton, and the full administration of his estate by his personal representative, his obligation upon the administration bond of Alexander H. Seth and John M. Frazier, in which Coates and Grafton were co-sureties, ceased and became extinguished not only as against his personal representative, but also as against his legatees and distributees, who have received his personal estate upon final administration by the executor.

2. The complainant, as executor of Coates, having paid the legacies under Robert Seth's will, after the administration and distribution of the personal estate of McHenry Grafton, Whether he, the complainant, is entitled to relief for contribution as against the legatees or distributees of the estate of Grafton, in respect to the distributions made to them under the will of their testator?

1. The administration bond, upon which Coates and Grafton were co-sureties, was given in 1865. Alexander H. Seth, the surviving administrator, with the will annexed, of Robert Seth, is and has been for a long time past utterly insolvent; and John M. Frazier, the other administrator and principal in the bond, died in 1870, also insolvent, and before the estate of Robert Seth was fully administered. Grafton, the co-surety with Coates, died in April, 1867, leaving considerable estate, and by his will disposed of his property to his mother and brothers and sisters, and appointed John M. Frazier and Thomas L. Hall his executors. Coates died in September, 1871, leaving a will wherein the complainant was made executor.

In October, 1870, Hall, the surviving administrator of Grafton, settled in the Orphans' Court his second and final account, showing that the personal estate of the testator had been fully administered, and thereupon passed over the property to the parties entitled to receive it under the will of the deceased.

In October, 1873, Alexander H. Seth, as surviving administrator of Robert Seth, passed an account in the Orphans' Court, showing certain balances due to the residuary legatees under the will of his testator;

¹ Only a part of the opinion is given.

and very soon thereafter suits were instituted on the administration bond, at the instance and for the use of some of such legatees, against the complainant as executor of Coates, and also against Alexander H. Seth, the surviving administrator, and against the executrix of Frazier, and also against Hall, the surviving executor of Grafton. In these suits recoveries were had as against the complainant; but, as against Seth, the judgments were unavailing, because of his insolvent condition, and as against Frazier's executrix there were no assets to be bound by judgment, and Hall, as the surviving executor of Grafton, successfully resisted recovery against him, on the ground that he had fully administered the estate of his testator before he was notified of the claims. Consequently, the complainant, as executor of Coates, was required and did pay, in 1874, not only the legacies for which judgments were recovered, but other legacies for which the bond was bound, amounting in the whole to the sum of \$4765.

Upon the facts, as detailed in the bill, the complainant prays that the legatees or distributees of the estate of Grafton may contribute their respective proportions to reimburse him, as the executor of Coates, to the extent of one-half of the amount which he has been required to pay to the legatees under the will of Robert Seth.

This application is resisted upon the ground that the estate of Grafton is entirely and completely exonerated from any and all obligation created by the bond, by reason of the death of Grafton and the full administration of his estate before the existence of the claims was notified to his executor, and that, consequently, there is no right of contribution that can be maintained by the complainant as against the legatees or distributees of the co-surety's estate.

That the executor of Grafton was exonerated, if he fully administered the estate and paid it over to the legatees or distributees without due notice of the claims, and after giving the notice by advertisement as required by the statute, may readily be conceded. The Code, Article 93, sec. 109, provides that, "In case all the assets have been paid away, delivered or distributed as herein directed, and a claim shall afterwards be exhibited, of which the administrator hath not notice by the exhibition of the claim legally authenticated, as herein required, *he shall not be answerable for the same;* and if he be sued for any claim, and shall make it appear to the Court in which suit is brought that he hath so paid away, delivered or distributed, and the plaintiff cannot prove that the defendant had notice as aforesaid before such payment, delivery or distribution, the Court shall not proceed to give judgment (although the amount of the claim against the deceased may be ascertained,) until the plaintiff shall be able to show further assets coming into the defendant's hands," &c. And again, by section 119 of the same Article of the Code, it is provided, that "Whenever it shall appear by the first or other account of an executor or administrator, that all the claims against or debts of the decedent, which have been known by or notified to him, have been discharged or allowed for in his

account, it shall be *his duty* to deliver up and distribute the surplus or residue as directed; provided, that his power and duty with respect to future assets shall not cease; and after such delivery he shall not be liable for any debt afterwards notified to him; provided, he shall have advertised as hereinbefore directed," &c. The succeeding section of the same Article of the Code, prescribes the form of the notice to be given to the creditors of the deceased.

The law is very explicit, as it appears from the sections of the Code recited, in providing for the exoneration of the executor, upon his observing certain precautions; but it is to be noticed and borne in mind that it is the executor or administrator personally that is to be exonerated and discharged, and not the estate of the decedent. It is nowhere declared or intimated that there should be no remedy for a creditor who may have failed to authenticate and notify his claim to the executor, before final administration; or that, if the creditor's claim be not ascertained or provable before such final settlement and distribution, he should be without remedy, notwithstanding his debtor's assets may be shewn to be abundant, simply because the executor or administrator may have delivered them over to legatees or distributees. It would be strange, indeed, if such were the provisions of the law. What would be the predicament of an absent creditor, who might be totally ignorant of either the death of his debtor, or of the administration of his estate? What would become of parties dependent for their protection and security upon official bonds, guardian bonds, trustees' bonds, and the like, where the breach has not occurred, or, if occurred has not been ascertained at the time of the final settlement and distribution of a surety's estate, if the position of the defendants in this case be sustained? Surely the law never contemplated the total discharge of the deceased surety's obligation in all such cases. In this case, the amounts for which the bond was ultimately liable, were not ascertained until October, 1873—about three years after the final settlement and distribution of Grafton's estate. Until these amounts were ascertained, and actually paid by the complainant, as the representative of the co-surety Coates, there was no claim provable by him against the estate of Grafton. No *laches* therefore can be imputed to him in not exhibiting the claim for contribution before distribution of Grafton's estate by his executor.

In England, as is well known, prior to Lord St. Leonards' Act, 22 and 23 Vict., ch. 35, it was the established practice for administrators and executors to administer their estates under the orders and decrees of the Court of Chancery, and one great object in resorting to that jurisdiction by the executor or administrator was to obtain indemnity and protection against all future liabilities after final settlement. The creditors were required to come in and prove their claims under the decree, just as they are required to come in and prove their claims under the notice given by the executor or administrator by the order of the Orphans' Court, in our practice. Those failing to come in and

prove their claims before final settlement and distribution of the estate, lost their remedy against the executor or administrator, but not as against the legatees or distributees. The same exoneration of the executor or administrator afforded in England by the decree in chancery, is provided for with us by statute.

In the case of *Waller v. Barrett*, 24 Beav. 413, an administration suit, Lord ROMILLY, the Master of the Rolls, in speaking of the effect of the omission of the creditor to come in and prove his claim under the decree, said: "In the first place, I hold this to be established by the authorities, that if breaches of covenant have been committed at the date of the decree, and the covenantee do not come in and prove under the decree, he will be barred of all remedy against the executors, and that the executors will be perfectly safe. It is the case of an existing debt, which the creditor does not come in and prove under the decree, and the Court having administered the assets protects the executors against all future claims. The creditor, however, is not left without his remedy, but that remedy is not against the executor. That principle is so fully established in this Court, that it is unnecessary to cite many authorities on the subject; but this is what Lord ELDON says in *Gillespie v. Alexander*, (3 Russ. 136,) on the subject. 'If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees to bring back the fund he may do so; but he cannot affect the legatees except by suit, and he cannot affect the executor at all.'" The authorities are exceedingly numerous upon this subject, all maintaining the same general doctrine, several of which are referred to by the Master of the Rolls, in *Waller v. Barrett*, and, among others, he refers to the case of *Knatchbull v. Fearnehead*, 3 Myl. & Cr. 122, in which Lord COTTENHAM said: "Where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pays away the residue without passing his accounts in this Court, he does it at his own risk." And to refer again to the case of *Waller v. Barrett*, the Master of the Rolls, in another part of his opinion, made these observations: "I am at a loss to conceive on what principle a debt which may arise *hereafter*, but which is not now existing, is to be treated on a footing different to an existing debt. The creditor, although advertised for, may be abroad at the time; he may be ignorant of the whole proceedings, and yet if he do not come in and claim, his only remedy in this Court is against the legatees." And in the case of *March v. Russell*, 3 Myl. & Cr. 31, referred to in argument, Lord Chancellor COTTENHAM treated the doctrine as one of the oldest and best established of the Court. He there said: "That a creditor may follow assets in the hands of the legatees to whom they have been delivered in ignorance of the creditor's demand, has been an established principle of this Court from the earliest period, of the decisions in which we have any traces." And in accordance with these, and many other authorities maintaining the same general principle,

Mr. Justice STORY has stated the doctrine as one as firmly established as any in the equity jurisprudence of the country. In the 2 *vol. Eq. Juris.*, sec. 1251, the learned author says: "But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a *clear right in equity*, in such a case, to follow the assets of the testator into their hands, as a trust fund for the payment of his debt. The legatees and distributees are in equity treated as trustees for this purpose; for they are not entitled to anything, except the surplus of the assets after all the debts are paid." This just and equitable doctrine formed a part of the system of jurisprudence implanted here from the mother country, and there is nothing in our testamentary system that at all militates against its continued operation. Indeed, it has been fully recognized by this Court in the case of *Kent v. Somervell*, 7 Gill & John. 265, 270, and has been applied and acted on in the case of *Hanson v. Worthington*, 12 Md. 418, with respect to a legacy erroneously paid. See, also, *Somervell v. Somervell*, 3 Gill, 276.

Now, in England, by Stat. 22 and 23 Vict. ch. 35, sec. 29, very much the same kind of notice by advertisement is required to be given to creditors to produce their claims to the administrator or executor, as that required to be given by our Code. It is provided that at the expiration of the time named in the notice for sending in such claims, the executor or administrator shall be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has notice, and shall not be liable for the assets, or any part thereof, so distributed, to any person of whose claim such executor or administrator shall not have had notice at the time of distribution. But it is declared that nothing in the Act shall be taken in any manner to prejudice the right of the creditor to follow the assets so distributed into the hands of the persons to whom distribution may be made; the object and design of the Act being to avoid the expense and delay attending administration suits, and to afford to the executor or administrator the same protection that he would have under a decree in chancery. *Clegg v. Rowland*, L. R. 3 Eq. Cas. 368. This same protection was designed by the sections of the Code to which we have referred, and hence, by the terms of the statute, only the executor or administrator is exonerated from liability upon final administration of the assets, and not the estate or those to whom it has been distributed. That such was the design of the statute is made apparent by comparison of section 108, of Art. 93, with the sections of the same Art. to which we have heretofore referred. By the sec. 108, if a claim be exhibited, and it be rejected or disputed by the executor or administrator, he is allowed to retain assets to pay it, provided it be established; but those assets are made liable to other claims, or to be delivered up on distribution, in case the claim retained for be not established; "and if on any claims exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dis-

pute or rejection, commence a suit for recovery, *the creditor shall be forever barred.*" By this provision, not only is the executor exonerated, but he is required to pay out or distribute the money retained, and the creditor is forever barred all right of recovery against the assets of the estate, no matter in whose hands they are found. No such bar or preclusion is provided in terms with reference to any claim that has not been exhibited, or which, in the nature of things, could not have been exhibited, before final administration; and hence it may well be concluded that no such bar or preclusion was ever intended with respect to such claims.

If, however, a party has a probable claim against an estate, and without sufficient cause, neglects to prove and exhibit it to the executor in due time, it may be that, in any subsequent attempt to pursue the assets in the hands of legatees or distributees, he will be successfully met with the defence of *laches*. That is a defence that depends upon the particular facts and circumstances of each case as disclosed. Here, as we have said, there is no ground for such a defence.

*Decree reversed, and cause remanded.*¹

SECTION IV.

PRIORITIES BETWEEN PROPERTY DEVISED, BEQUEATHED, AND INTESTATE.

A. *In General.*

LONG v. SHORT.

CHANCERY. 1718.

[Reported 1 P. Wms. 403.]

ONE seised in fee of some lands, and possessed of a lease for years in other lands, and being indebted by specialty and simple contract, made his will, by which he devised a rent-charge of £40 a year out of the lease for years to one grandson, bequeathed the lease itself to another grandson, and likewise devised all his lands in fee to A. and his heirs. None of his devisees were his heirs at law, and his will was made since the Statute against Fraudulent Devises.

And there being a deficiency of assets to pay debts, the question was, whether they should be charged on the real, or leasehold estate?

Decreed by LORD CHANCELLOR [COWPER], 1st, that a devise of a rent-charge out of a term, is as much a specific devise, as if it had been of the term itself.

2dly, that the devise of a term for years is as much a specific devise, as a devise of land in fee. Wherefore, each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intent, to defeat either, by subjecting it to the testator's debts.

¹ See 2 Woerner Amer. Law Adm. (2d ed.) §§ 575-579, and cf. *Bassett v. Drew*, 176 Mass. 141, *ante*.

3dly, that since the Statute of Fraudulent Devises, lands in fee are equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or legatee are to debts by simple contract at common law.

So that to prevent the disappointment of the testator's intent, the court thought it reasonable, that the devisee of the fee-simple estate, and the devisees of the lease and annuity, should each contribute to the debts by specialty, in proportion to the value of the respective premises; but that as to the debts by simple contract, if there should be not enough, over and above to pay them, they must fall upon the leasehold premises only.

Hereupon it was objected by *Sir Thomas Powis* and *Mr. Vernon*, that the fee-simple and inheritance ought to be more favored, than any of the personal estate and leases; for that the latter had been always decreed to go in aid of the former, and therefore, in this case, the leasehold estate ought to bear all the debts by specialty, as far as it would extend.

But overruled by LORD CHANCELLOR; for that this might utterly disappoint the testator's intention in providing for his grandsons out of the lease; though the court allowed, that if the devise had been to A. of all the rest of the testator's lands, this had been a residuary (not specific) devise, and the person taking thereby, should not have come in, till after the debts by specialty, or otherwise, had been paid out of his inheritance.¹

CLIFTON v. BURT.

CHANCERY. 1720.

[Reported 1 P. Wms. 679.]

A. SEISED in fee of freehold lands, and likewise of some copyhold lands which he had *not* surrendered to the use of his will, and indebted by bond in which his heirs were bound, in 1706, made his will, whereby he devised his freehold lands to B. in fee, without charging them with any of his debts and legacies, and gives his copyhold lands to C. in fee, in trust to sell to pay his debts and legacies, and having given a legacy of £500 to D., died, leaving E. his executor; D., the legatee of the £500, brought his bill for his legacy; upon which LORD HARCOURT [C.], decreed, that as to so much of the personal estate as was exhausted by the bond-debt, the legatee of the £500 should stand in the place of the bond creditor against the land, and that the freehold estate should be liable, in default of personal assets, to pay the legacy.

From this decree the devisee of the freehold lands now appealed to the LORD PARKER [C.], insisting that the £500 legacy being by the will

¹ *Long v. Short* is considered and explained in *In re Saunders-Davies*, L. R. 34 Ch. D. 482 (1887).

See *Tombs v. Roch*, 2 Coll. 490 (1846); *Gervis v. Gervis*, 14 Sim. 654 (1847); *Furnum v. Bascom*, 122 Mass. 282 (1877); *Dauel v. Arnold*, 201 Ill. 570 (1903), accord. *Rogers v. Rogers*, 1 Paige, 188 (N. Y. 1828), is contra.

charged on the copyhold estate, and that fund failing for want of a surrender, the freehold estate which was expressly devised to another person ought not to be liable, and that the land being specifically devised, was not chargeable with a general pecuniary legacy.

LORD PARKER, having taken time to consider of it, reversed that part of the decree whereby the freehold estate was subjected to the legacy; observing first, that though equity will marshal assets in favor of a legatee, as well as of a simple contract creditor, yet every devisee of land is as a specific legatee, and shall not be broken in upon, or made to contribute towards a pecuniary legacy.

Secondly, that it was a rule, if one gives a specific legacy of a horse, or diamond, and also a pecuniary legacy of £500 to B. and there are not assets to pay both, still the specific legatee shall be preferred and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator.

Thirdly, that if a specific personal legatee shall not contribute toward a pecuniary legacy, much less shall a specific devisee of land.

Fourthly, that if in the principal case the testator has devised the £500 to A. and a term of 500 years to B. without leaving assets to pay the £500, still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy; and if such pecuniary legatee shall not break in upon a specific legatee of a term, *a fortiori* shall he not disappoint the will as to a devise in fee, which is more to be favored than a devise of a term, in regard it is with more difficulty that a court of equity, in any case, breaks in upon, or charges, a real estate.

Fifthly, that this case was still stronger, where the testator had appointed a fund for the payment of the legacies, viz., the copyhold; and though that had failed for want of a surrender, the consequence would be, that the fund failing, the legacy must fail also. Indeed the bond creditor might elect to have his debt out of the assets in the hands of the heir, or of the devisee, but in such case the heir or devisee should have this relief, viz. to stand in the place of the bond creditor, and reimburse himself out of the personal estate.

Sixthly, but though equity would thus marshal the application of assets, yet would it not do this to disappoint the will of the testator, by breaking in upon the devise of the freehold which the testator did not intend to charge, but on the contrary showed his design to charge the copyhold estate therewith.

And note, that the decretal order in the case of *Hern v. Merrick* [1 P. Wms. 201] was produced, whereby it appeared, that Lord Harcourt did not then determine this point, but reserved it for further consideration.¹

¹ "It has been contended, that under the first clause of this will, 'First I will and direct, that all my legal debts, legacies, and funeral expenses, shall be fully paid, &c.'

MANNING v. SPOONER.

CHANCERY. 1796.

[Reported 3 Ves. Jr. 114.]

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.]¹ The question, whether the descended estate is liable before those devised, depends entirely upon this point, whether there is a specific gift of any part of the estate for the purpose of paying the debts; or whether it is only a general charge for that purpose; for upon the doctrine, that is very fully laid down by Lord Thurlow in *Donne v. Lewis*, 2 Bro. C. C. 257, there is no doubt of the manner in which the estate of a testator is to be applied in discharging his debts. That case had a very full consideration and discussion; and it was determined upon principles, that have been constantly acted upon since; and which must govern all such cases. From that I collect, that there are four classes of estates to be applied to the debts: 1st, the general personal estate, unless exempted expressly or by plain implication: 2dly, any estate particularly devised for the purpose, and only for the purpose, of paying debts: 3dly, estates descended: 4thly, estates specifically devised. The question therefore is in every case, where the contest is between an estate descended and an estate alleged to be provided for the debts, whether it is a general charge, or any part of the estate is selected for the express purpose of paying the debts. If part is selected for that purpose, that part shall be applied before the descended estate; whether the testator had that estate before he made his will, or not. Lord Thurlow, in considering *Galton v. Hancock*, 2 Atk. 424; *Wride v. Clark*, 2 Bro. C. C. 259 n., 261 n., and *Davies v. Topp*, is clearly of opinion, that the question is, whether the testator has selected any part of his estates, which it was his will should be first applied; or whether the charge is only to subject his estates to the payment of his debts; which otherwise perhaps could not be applicable to them.

where the testator has charged his real estate by will duly attested, both debts and legacies shall take place of every other disposition; and that the legacies shall stand in the same place as debts; even to the disappointment of the devisees; and that there is no reason, why they should not have the same preference. The principle however is perfectly different; the one being purely voluntary, the other obligatory. Wherever a man makes a will, he is supposed to do that, which conscience obliges him to do; and if he shows an intention, that his debts shall take place of every other disposition, and that he meant they should be paid, the court will strictly enforce that intention. The same principle will not apply to legacies, which have been attempted to be put upon the same footing: but it does not follow, that where a testator says, 'In the first place I will, that all my debts and legacies shall be paid;' and then gives certain legacies; and at the latter end of it repeats these words, that such legacies as well as his debts shall be a charge upon the realty; and that because the latter must have a preference, the former shall also have it. The estate so contended to be charged is specifically devised; and I cannot see any reason, why pecuniary legacies should have any preference to such specific devises. If I was to direct these legacies to be so raised and paid, it would be giving them that undue preference." — *Per* SIR RICHARD PEPPER ARDEN, M. R., in *Kightley v. Kightley*, 2 Ves. Jr. 328, 330 (1794).

¹ Only the opinion is here given.

That will not make the devised estates applicable in the distribution before those descended. Then taking this case for my guide I am only to consider, which is the case here ; whether it is a general charge, or part is selected and appropriated to the debts ; and the words are so emphatical as fully to convey the principles, that will guide the decision ;¹ especially when we consider the nature of this property ; which is situated in the West Indies ; and is liable to all his debts independently of any will of his. But even if it was an English estate, which is not liable to all debts, even in that case I should have thought, that a provision of this sort appropriating the rents and profits first to the payment of his debts, is a specific gift, which must be first applied. I cannot consider this as being a general charge for the purpose only of preventing any of his debts remaining unpaid ; for the law of the country, where they lie, had sufficiently provided for that ; therefore if it is to have any effect, it must be to appropriate this fund, and for no other purpose. If so, the question is, whether according to the principles laid down in *Donne v. Lewis*, the plaintiffs have a right to call upon the heir, to whom the estate purchased after the date of the will has descended, to apply that estate first to the debts ; and I am of opinion, the heir cannot be called upon to contribute, till that fund, so appropriated, not merely to take care that all the debts shall be paid, but for the particular purpose of the appropriation, has been exhausted. The heir cannot avail herself of this except by being reimbursed out of the rents and profits of this trust fund. She cannot postpone the creditors. That was the case of *Lingard v. Lord Derby*, 1 Bro. C. C. 311. The testator may arrange between his heir and devisee ; but not so as to take away from the creditor a fund, he has a right to come upon. But if creditors are not concerned, the plaintiffs have no right to call upon the heir ; and the money must be paid to her ; and the supplemental bill must be dismissed.

Mr. Piggott and *Mr. Thomson*, for the devisees.

Mr. Lloyd, *Mr. Grant*, and *Mr. Allcock*, for the heir.

EX PARTE CHADWIN.

CHANCERY. 1818.

[*Reported 3 Swanst.* 380.]

WILLIAM ROE, by his will dated the 11th of January, 1804, and duly executed to pass real estates, after directing that all his just debts, and funeral and testamentary expenses, should be paid out of his real

¹ The testator gave all his real estate in the islands of Antigua, St. Christopher's, and Tortola, to trustees and their heirs in trust, that they should cultivate and manage the same, and apply the rents and profits, after paying and receiving certain annuities, in the payment of such of his debts and legacies as the residue of his personal estate should prove deficient in paying. — Ed.

and personal estate, devised and bequeathed to George Chadwin, his brother-in-law, and Thomas Dakin, all his real and personal estate to them, their heirs, &c., upon trust to sell, with a direction that their receipts should be sufficient discharges; and upon farther trust, and he directed his trustees in the first place, to place out at interest the sum of £400, on mortgage or government security, the interest to be paid to the testator's widow half-yearly during her life, in bar of dower; and immediately after her decease he bequeathed the said sum to his nephew William Chadwin; and upon farther trust, out of the residue of the money to arise from the sale of his estate and effects, to discharge all his debts, funeral and testamentary expenses, and the expenses of the trust, and subject thereto, on trust to place out at interest the farther sum of £400 upon mortgage or government security; the annual interest to be paid to his brother John Roe during his life, and immediately after his decease, the said sum to be called in and divided among the children of John Roe equally; and on farther trust out of the residue of the money to arise from the sale, to pay to each of the testator's nephews £100, and to each of his nieces £50, when they should attain twenty-one; and the residue of his estate he gave to his nephew William Chadwin, and appointed George Chadwin and Thomas Dakin executors.

Dakin having renounced probate, the will was proved in March, 1804, by George Chadwin, who sold the testator's estates, and paid his debts and funeral and testamentary expenses; and instead of investing the residue according to the trusts of the will, employed it in trade, and in the purchase of a real estate for his own benefit. Interest on the sum of £400 was paid to the testator's widow to the 25th of March, 1812, and interest on the like sum was paid to the testator's brother, John Roe, to the same time; and two of the testator's nieces received the legacies bequeathed to them.

In July, 1811, a commission of bankrupt was issued against George Chadwin, the executor.

Soon after the bankruptcy, William Chadwin, the nephew and residuary legatee of the testator, presented a petition, on which an order, dated the 15th of April, 1813, was made, directing a reference to the commissioners to take an account of the assets of the testator possessed by the bankrupt, and how he had applied and disposed thereof, and what remained due from him on account thereof at the time of the bankruptcy, and the petitioner was to be at liberty to prove such sum as should be found due upon the account directed; and it was ordered that the assignees should pay the respective dividends which should be declared upon the amount of such proof (the amount of such respective dividends so to be paid from time to time, to be verified by affidavit), into the bank, with the privity of the accountant-general of the Court of Chancery, in trust in this matter, to be placed to the account of the personal estate of the testator, subject to farther order; with liberty for the petitioner and all other parties interested under the said testator's will, to apply as they should be advised; and it was

ordered that the costs of the application should be paid to the petitioner.

By virtue of this order the petitioner proved a debt of £8,185 5s. 11d. under the commission; and two dividends thereon, amounting to £1,313 18s. 7d., were paid into the bank.

William Chadwin then presented another petition, stating that the testator's widow and her second husband had assigned to him her interest in the sum of £400; that the testator's brother, John Roe, was still living, having four children, three of whom were infants; that Thomas Roe, another brother of the testator, was also living, having one child, an infant; that the petitioner was the eldest son of Elizabeth Chadwin, the sister of the testator, who had five other children, the testator having no other brother or sister; and that the petitioner had thus become entitled to the present interest in the whole of the legacy of £400, and also to the legacy of £100, as one of the testator's nephews, and to all the residue of the testator's estate after payment of his debts and legacies; and submitting that the legacy of £400 was by the will a primary charge on the produce of the sale of the testator's estates, and that the petitioner was entitled to be paid the same in full, out of the sum of £1,313 18s. 7d.

The petition prayed, a declaration that the petitioner was entitled to be paid the legacy of £400, with interest, from the 25th of March, 1812, in full, and payment thereof, out of the sum of £1,313 18s. 7d., and an account of what was due to him for principal and interest, and payment of the residue of that sum among the petitioner and the other legatees, according to their several priorities, in part satisfaction of their legacies; or, if the Lord Chancellor should be of opinion that the petitioner was not entitled to be paid the sum of £400 in full, then that an account might be taken of the clear amount of the testator's estate at the time of his death, and of the amount of the clear residue that would have remained of that estate, after paying all his debts, funeral and testamentary expenses and legacies, if the same had in fact been paid, and that the several legacies given by the will, and the amount of the said residue, might be ordered to abate proportionally; and that the sum of £1,313 18s. 7d. might be apportioned among the petitioner and the several other legatees, in proportion to the amount of their several legacies, and of the said residue.

The master, on another petition by the same petitioner, having reported that all the debts of the testator were paid, in March, 1817, William Chadwin presented a farther petition, praying the confirmation of that report, and that the original petition might be farther heard.

The case was argued by *Sir Samuel Romilly* and *Mr. Stephen*, *Mr. Horne*, and *Mr. Rose*.

The cases cited were *Dyose v. Dyose*, 1 P. W. 305; *Fonnereau v. Poyntz*, 1 Bro. C. C. 472; and *Humphreys v. Humphreys*, 2 Cox, 184.

THE LORD CHANCELLOR [ELDON]. This petition prays payment, not out of the testator's estate, but out of dividends declared on the amount

due to the testator's estate from the party who has become bankrupt, and claims a proportionate abatement among the pecuniary legatees and the residuary legatee.

The first part of this petition, which prays that the legacy of £400, the entire interest in which the petitioner has acquired by assignment from the testator's widow, may be paid in full, preferably to all the other legacies, is founded on the passage in the will, directing the trustees, "in the first place," to invest that sum; and on the expressions which precede the subsequent bequests, "upon further trust, out of the residue of the money," to pay debts and funeral and testamentary expenses, and "subject thereto and on trust," to invest other sums; and it was insisted in the argument, that these expressions manifest an anxiety in the testator, that the sum to be invested for the benefit of his wife should have priority even over the payment of his debts. Each legacy in succession is given out of the residue; which, it has been properly contended, means what remains after the prior application of the fund.

Under the ulterior bequests infants are interested, and a considerable question arises how far their rights can be bound by an order on a petition in the bankruptcy of the executor; such an arrangement may be beneficial to them, but it appears to me that it can hardly be said that the court can so bind them. The question, whether by reason of the deficiency of the estate, not only the pecuniary legatees should abate among themselves, but a computation should be made of what would be coming to the residuary legatee, and he should be considered on the footing of a pecuniary legatee to that amount, and an abatement be made among them all, is extremely difficult, and ought to be made the subject of a bill, did not the small amount of the fund render it advisable to obtain a decision in this way, rather than to institute a suit, which would absorb the estate.

If there had been assets for payment of all the legacies no question could have arisen; the residuary legatee could not in that character have objected to the payment of the antecedent legacies, but must have been content with whatever might happen to be the residue, and while there was sufficient to satisfy the pecuniary legacies, there would have been no reason for discussing their priorities.

A question might have arisen involving no consideration of the consequences of the *devastavit* which has been committed. Supposing the testator's estate insufficient to satisfy all the legacies, the question would then have been, the funds left by the testator not being adequate to pay all that he intended to be paid, did he intend that the first mentioned sum of £400 should be paid in priority to all the rest, and each of the successive legacies in priority to those which follow it? But the case which I have supposed differs entirely from the present, assuming an estate unaffected by *devastavit*, and to be distributed according to the effect of the testator's will; whereas, in the events that have occurred, the executor instead of applying himself to the due adminis-

tration of the testator's estate, paying the legacies according to their priorities, if there were priorities, and making proper investments, paid interest to the testator's widow, and to one of his brothers; and that sort of transaction introduces another question not touched by any prior decision, whether the legatees have not so dealt with this executor in regard to their respective legacies, as to have made him their debtor for each respectively; and whether the proper proof under the commission would not have been, not one entire proof, but subdivided proof for the respective legacies?

Assuming that in this case the latter ingredient is not to be regarded, the court is to consider what the law is where, there being both pecuniary legatees without priorities among themselves, and a residuary legatee, and by reason of the *devastavit* of the executor, the estate having become insufficient to pay all the pecuniary legacies, the residuary legatee insists that the estate at the death of the testator being sufficient, and there then being a residue of £2,000 or £3,000, he is entitled to rank as a legatee of that sum, and to represent that the executor being a debtor to the aggregate body of legatees, he is to be considered a creditor for the residue?

In the first case cited, *Dyose v. Dyose*, 1 P. W. 305, Lord Cowper in the instance of deficiency by a *devastavit*, held that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate which could be recovered after the *devastavit*, was divisible not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

That case came under the consideration of Lord Thurlow in *Fonnerneau v. Poyntz*, 1 Bro. C. C. 472, see p. 478, where the principal question related to the admissibility of parol evidence; and advertent to the argument which had been deduced from Lord Cowper's decision, Lord Thurlow declared that he could not agree to the law of that case, and deprecated the doctrine, that whenever a testator gives a residue he is to be understood as intending to leave a residue.

In *Humphreys v. Humphreys*, 2 Cox, 184, Lord Thurlow did not content himself with expressing disapprobation of the doctrine in *Dyose v. Dyose*, but seems to me to have decided against it; for in that case the residue had been diminished, not by the act of the executor after the death of the testator, but by the act of the testator alone; and Lord Thurlow remarks, that if the inference there attempted to be drawn from Lord Cowper's decree were correct, the inquiry into the state of the assets should have referred to the date of the will, and not to the death of the testator.

Lord Thurlow may, therefore, be considered as having condemned the decision in *Dyose v. Dyose*;¹ and if there were no question in the

¹ Lord Thurlow's condemnation of that case has been approved by Sir William Grant, *Page v. Leapingwell*, 18 Ves. 466. — REP.

present case but this, whether the residuary legatee can come in competition with the pecuniary legatees, Lord Thurlow's authority would be opposed to the claim of the residuary legatee.

A case in which after the death of the testator, the executor deals with the property as he thinks fit, there being no accession to that dealing on the part of those for whom he is trustee, is widely different from the present case, in which those who might every day have made demands on the executor, have dealt with him as a person having in his hands so much of their money, and have from time to time received from him interest on various sums to which they are respectively entitled. Such transactions give rise to a question which requires much consideration, whether the legatees have not thereby made the executor severally their debtor. If the testator's widow, whom the petitioner by her assignment represents, had required the executor in the first place to separate the £400 from the bulk of the assets, and invest it in a mortgage, and that course had been adopted, no question could have arisen between the first legatee and the rest, on the effect of the *devastavit*. Instead of that, the executor is permitted by the widow and the other legatees, to retain the legacies, paying interest for them; and the question then arises, whether, supposing Lord Thurlow right, these supervening circumstances in the conduct of the respective legatees vary the case, and lay a ground for the doctrine of *Dyose v. Dyose*, not on the reasoning there suggested, but on the principle that the widow and the adult legatee having received interest on their legacies, and the residuary legatee having been entitled to receive the fruits of his legacy, if there were any, a mixed case exists, which renders it reasonable to declare that this sum of £1,300 shall be divided among the legatees, as the £3,000 would have been divisible if the executor were solvent? Whether it is not most just to hold that there is an end of the will as to priorities, and that arrangements having been made by all the legatees, the fund in the hands of the executors is applicable for the benefit of all according to those arrangements, as they may be considered to have rendered the executor the debtor of each of the legatees separately?

After anxious and frequent consideration, I know no better view of this case. If the parties are content with it, I venture to say that it is for the benefit of the infants that it should be so considered; but if the parties are not content, I ought not to be satisfied, feeling that this is as difficult a case as I ever had to deal with; and I must put them to file a bill.

Mr. Cullen (amicus curiæ) observed, that the proof represented the testator's estate, and that the total was augmented by the amount to which the residuary legatee was entitled.

THE LORD CHANCELLOR. I am of opinion that the residuary legatee ought to be considered a creditor for the amount of residue at the death of the testator. This view of the case admits him on a principle different from that adopted in *Dyose v. Dyose*, and excludes him from priority in respect of the £400.

GREVILLE v. BROWNE.

HOUSE OF LORDS. 1859.

[Reported 7 H. L. C. 689.]

THIS was an appeal against a decision of the *Lord Chancellor* and *Lord Justice Blackburne*, sitting as Commissioners of Appeal, from the judgment of the Encumbered Estates Court.

John Browne, of Galway, had one son, Michael J. Browne, and two daughters, Maria (Lady Ffrench) and the respondent. By his will (which contained many interlineations), dated 20th January, 1825, he bequeathed to his wife an annuity of £100 in addition to what she was entitled to under her marriage settlement, "the same to be in lieu and satisfaction of any dower or thirds she may be entitled to out of my real estates, or any other property I may die possessed of," with the usual power of distress. Then followed a bequest of the household furniture to his wife; then a sum of £1,000 in trust, to give such part of it as she might think fit to his daughter Anne on her marriage with her mother's consent, "to bear no interest till then; the entire (whole) or the remainder of the said sum of £1,000 to go and be considered as part of the residue of any property as hereafter bequeathed to my first object on earth, my best of sons, Michael Joseph Browne. I further bequeath to my dear and very dear daughter Anne Browne, in addition to any part of the above-recited sum of £1,000, a further or additional sum of £5,000 sterling, including the property already settled on her by my marriage articles; and also the value of the property made over for her use before, all payable on her marriage with the consent of her mother, the interest thereof, at five per cent, to be regularly paid till then. But should my said daughter Anne Browne die before her marriage, then my will is that this bequest shall be considered as part of the residue of my property, and go and merge in same." To his daughter Lady Ffrench (to whom he had given as a portion £10,000) and to her husband and children, and to his own sister Julia he left £5 apiece, and concluded thus: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise, I hereby bequeath, devise, give, and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of the same in any manner he may think proper," and he appointed his son his sole executor. By a codicil he appointed John Kirwan his executor in case his son should not wish to act as one of the executors.

The testator died in 1825, and the son having declined to act as executor, the will was proved by Kirwan.

Michael Joseph Browne, the son, entered into possession of the estates, and paid the interest on the legacy of £5,000 to his sister

down to 1842. On the 1st September, 1846, he mortgaged the estates to the appellant and other persons. On the 29th May, 1852, a petition for sale was presented in the Encumbered Estates Court, and an absolute order for sale was made on the 8th September, 1852. On the 4th December, 1855, the estates were sold for a sum of £69,410, a sum not sufficient to pay off the mortgages and interest then due.

On the settling of the final schedule on the 15th December, 1856, *Mr. Commissioner Longfield* held, that the respondent, Anne Browne, was entitled to be paid the legacies bequeathed to her by the will of her father in priority to the mortgagees. The full court confirmed this decision, and on appeal to the *Lord Chancellor* and *Lord Justice Blackburne* in the Court of Appeal, it was again affirmed. The present appeal was then brought.

The Attorney-General (Sir R. Bethell) and *Mr. Moxon*, for the appellant.

Mr. Roundell Palmer and *Mr. Lawless* (of the Irish bar), for the respondent, were not called on.

THE LORD CHANCELLOR. (LORD CAMPBELL.) My Lords, in this case I am of opinion that the decision of *Mr. Commissioner Longfield* and *Mr. Commissioner Hargrave*, confirmed by the *Lord Chancellor of Ireland* and the *Lord Justice of Appeal in Ireland*, is right; and I think that if your Lordships were to come to a contrary conclusion, you would disturb the well-settled and useful rules of property which have prevailed for a century and a half.

My Lords, the first question is, whether these legacies are a charge upon the real estate. If it were *res integra*, and we had to construe this will by the language employed, without any reference to the construction which has been put upon similar language in other wills, I might allow that there is great force in the very able and ingenious argument we have had from the bar. It might then be contended that the testator had no notion whatever of charging the land with these legacies; but we find that from the time of *Lord Macclesfield* and *Lord Cowper*, down to the time of *Lord Cottenham* and *Vice-Chancellor Page Wood*, a rule has prevailed upon this subject which has been acted upon uniformly by all judges except *Lord Alvanley*, a very eminent authority (I do not mean in the slightest degree to disparage him), but with that exception by all the judges that have determined such cases. For nearly a century and a half this rule has been laid down and acted upon, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given minus what has been before given, and therefore given subject to the prior gift. That seems to me to be the view which was taken in the cases before *Lord Cowper* and *Lord Macclesfield*. The language in which it is expressed varies from time to time, but still that rule seems to have

been uniformly acted upon, and I would say, in the language used by Vice-Chancellor Page Wood, in the last case upon the subject, *Wheeler v. Howell* [3 K. & J. 198], that in the present case "I feel that I should be only introducing a useless and mischievous distinction if I held the legacy not to be a charge, the principle of the decision being in truth the same in the case of legacies as in that of debts."

I therefore conceive it to be unnecessary to travel over and criticise that long series of cases which seems to establish that as a general rule which must be acted upon, that the testator, in using this language in his will, must be supposed to use it according to the sense in which the words have uniformly been construed, and to mean that the legacies should be a charge upon the real estate. Here the testator gives the legacies generally, and then he says: "As to all the rest, residue and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities or otherwise, I hereby bequeath, devise, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can." It is quite clear, that here there is first a general gift of legacies, and then there is a disposition of the rest, residue, and remainder of his property, real and personal, of what nature soever, to his son. Therefore, following the rule which has been so long acted upon, these legacies are clearly charged upon the real estate.

Then, my Lords, as to the second point, the discharge. Twenty-one years after the death of the testator, his son mortgaged the land for £50,000; and it is allowed that upon the face of the deed there is no reference whatsoever to those legacies. No part of the legacies was paid; and I presume, that after he had thus charged the land with the legacies, unless there is some special power in the will enabling the son to sell the land discharged from the legacies, it can hardly be supposed that what has taken place can amount to a discharge of the burden that was placed upon the land in respect of the legacies. No authority has been quoted to show that this power exists. Is there, then, here any such special power? I am of opinion that the words that follow what I have read are mere surplusage; they merely express what would otherwise be implied. This testator is fond of a florid style; he deals in superlatives; he is very rhetorical, and he makes use of a great many more words than would be sufficient to accomplish his purpose. He says: "I hereby devise, bequeath, give and grant the same to my first object on earth, my son, Michael Joseph Browne, in the fullest manner I can or shall have it in my power, with liberty to him to dispose of same in any way he may think proper." We are now considering whether these lands have been discharged of the legacies: we must consider that they are charged with them. Then he, having thus charged the land, did he mean by those words to give his eldest son the power of disposing of the land at any time, so that

the younger children would be deprived of the security which he had before provided for them? I think that no such meaning can be deduced from the language he employs, and that therefore this mortgage has not the effect of discharging the land of these legacies. My opinion is, that this appeal should be dismissed, and the decree affirmed.

LORD BROUGHAM. My Lords, I entirely concur with my noble and learned friend, that these legacies are a charge upon the land. The only difference of opinion that I have with him is, that whereas my noble and learned friend said that if it were *res integra*, not ruled by a long current of decisions, there might be a doubt about it, I really have no doubt at all about it. In the first place, I have no doubt that the decisions which have been given upon this subject are strictly and logically correct; and then I have no doubt also upon the construction of the words themselves, that the legacies here are a charge upon the land.

LORD CRANWORTH. My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends, and I also concur with my noble and learned friend opposite, that if there had not been a single decision upon this subject, if I were only called upon to say what is the meaning of such a devise, according to the natural import of the words, and knowing by what class of persons they are written, I should not have the least doubt in the world that nine persons out of ten would mean exactly what the cases have interpreted the words to mean. The distinction that is suggested between real and personal property is an artificial part of the case. It is perfectly true that we know how differently real property and personal property are dealt with by our law. And in reading a devise of real estate to one person and of personal legacies to another, and of the rest and residue of the real and personal property to a third, we may see that there might be a mode of interpreting it *reddendo singula singulis*, as meaning to give the rest of the personal property to one person, and the rest of the realty to another. But that is not the natural meaning of the words. I feel the force of something that was said by Sir John Leach, not in the case in *Maddock*, but in a subsequent case, where, with reference to the words "the rest and residue of my real and personal estate," he says, that the rest and residue mean something after something has been deducted. After what has been deducted? Why, that which has been given before: and that appears to me to solve the whole difficulty.

The Attorney-General, in his very able argument yesterday, tried to point out a distinction which exists in some of the earlier cases, for the purpose of showing that the generality of the rule, as laid down in the more modern cases, was not warranted by those earlier decisions; and he refers particularly to the case of *Awbrey v. Middleton* [2 Eq. Cas. Abr. 497] as being the earliest case upon the subject; and he endeavored to distinguish that case by the circumstance that the legacies there were directed to be paid by the executor, and the gift of

the general residue of the realty and personalty was to the executor. He is perfectly correct in that; but it is a singular thing that, not only does Lord Cowper not put his decision upon that, but counsel at the bar, adverting to that circumstance of the direction of the legacies to be paid by the executor, actually puts it as an argument for the contrary result, and says that, inasmuch as the legacies were to be paid by the executor, that shows that they were to be paid only out of the personal estate. In truth, in *Aubrey v. Middleton* the real question, as I understand it, was whether, under the gift of "all the rest and residue of his goods and chattels and estate," real estate was meant to be included. There had been a previous gift in the will of a particular real estate, and the question seemed to turn upon this, whether the word "estate" there was to be held to include real estate. And Lord Cowper said that, inasmuch as he begins by saying, "As to all my worldly estate, I give in manner following," the word "estate" was to be taken to include real estate. But he does not put it at all upon the fact of the direction to the executor, who was his nephew and sole residuary legatee. What he says is this: "Now, the words (rest and residue) in this place may have some stress laid upon them, and seem to refer to the introductory clause in the will (as to all his worldly estate, &c.), which certainly extends to lands in a will, and will bear a larger construction by reference to the first clause, by which he intimates that he intended to dispose of all his estate, both real and personal, by his will, and therefore he was of opinion that by the devise of all the rest and residue of his goods, chattels, and estate, all his lands do pass to his executor, and that he takes by the will, and not by descent as heir at law."

Then, with regard to the decision of *Bench v. Biles* [4 Madd. 137], before Sir John Leach, the Attorney-General endeavored very ably to distinguish it from the present case. It appears to me to be utterly undistinguishable. It is true that in that case the blending of the real estate with the personal took place during the life of the widow, who took the whole during her life. What difference does that make? The testator gives all his real and personal estate to his wife for life; he gives pecuniary legacies, and all the rest, residue, and remainder of his real and personal estate he gave, devised, and bequeathed to his two nephews. How is the effect of that altered by the fact that there had been a previous life estate before the pecuniary legacies took effect?

That authority was followed by the same learned judge in *Cole v. Turner* [4 Russ. 376], when he was at the Rolls, and which has been evidently followed by Lord Cottenham in *Mirehouse v. Scaipe* [2 Myl. & Cr. 695], and it has been since followed in two cases by Vice-Chancellor Page Wood. And I feel perfectly confident that if we could know the amounts of property that have been distributed, of which there is no report, in reliance upon the rule of construction laid down by these decisions, we should feel that we were doing the greatest possible injustice

if we were to swerve in the slightest degree from what I consider to be the settled canon of construction: I therefore concur with my noble and learned friend that the judgment below ought to be affirmed.

LORD WENSLEYDALE. My Lords, the question in this case is as to the construction of the will of Mr. Browne. What is the true meaning of that will? I take it to be a long and well-established rule, that we must read the words of a will in their ordinary grammatical sense, and give them no other construction than that, unless so reading them leads to some absurdity, or some contradiction to another part of the instrument which is to be construed. There is no occasion to apply the latter part of the rule in this case.

Now, I confess that without reference to former decisions that have been given upon the subject, if I had read this will for the first time, and had not known that there was any decision upon it, I should not have entertained the least doubt as to its meaning. The testator first begins by a charge upon this estate of £100 a year, with a power to distrain; that is clearly a charge upon the real estate. He then gives other legacies of £1,000 and £5,000, and other small legacies which are clearly *prima facie* a charge upon the personal estate; and then he gives the residue in these terms: "As to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates, freehold leases, leases for years, stocks of every kind, also bills, bonds, notes, annuities, or otherwise" (that is, both real and personal), "I hereby devise the same to my son Michael Joseph Browne in the fullest manner I can." I certainly should not feel the least doubt myself that the meaning of that was simply to leave the rest of the personal estate minus the charge upon the real estate. That would give effect to every word in the will; that is, "I leave the remainder of my real estate charged as aforesaid, and I leave the rest of my personal estate, which has several charges upon it before." I should not have had the slightest doubt that that was the true construction of it, and I should never have dreamt that the testator meant to say that the charge upon the personal estate was to be transferred to the real estate.

I have heard complaints at the bar, and I have strongly shared in those complaints, that in all questions of this kind relating to wills, innumerable cases are cited which are of very little authority, because the words of one will differ so much from those of another, that there is very seldom any light derived from decisions upon other wills. If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases. And my doubt is certainly, after hearing the very able argument of the Attorney-General at the bar, whether you can predicate from this long bead-roll of cases, that any such principle has been established, that because a testator happens to mention real and personal property in

one category, therefore the real property is liable for the legacies. But as my noble and learned friends take a different view, and consider that it has been established as a proposition that wherever realty and personalty are united together in one fund, they are both made subject to the legacies given by the will, of course, that rule of construction must be applied to this particular will. But I own for myself that it would require a much more careful consideration of the authorities than I have now been able to give to them to lead me to come to that conclusion. The impression upon my own mind is, that there has been no such positive rule established.

With respect to the other part of the case, I concur entirely with my noble and learned friend on the Woolsack. I think these words at the conclusion of the will really give no power at all; they are only an amplification of his gift of the entire estate: "I give and grant the same to my son, Michael Joseph Browne, in the fullest manner I can;" that means merely, I give it to him in fee simple, "with liberty to him to dispose of the same;" that is merely a consequence of his having the fee simple. Therefore, I think in this case there is no power given to mortgage the estate free from the legacies.

LORD KINGSDOWN. My Lords, I confess that when I read this will at first, it appeared to me to be so clear upon the authorities, as I had understood them to be when I was more familiar with them than I am afraid I can boast of being now, that I thought that some subsequent decision must have altered or diminished the authority of those cases. But from the argument that has been addressed at the bar, it appears, that instead of the rule being limited, it has been, I think, extended, I do not say at all too far, but certainly something beyond the exact principle to which those former authorities went, because it has been applied, I think, in the late cases (I do not mean to cast any doubt upon them) not merely to property given under the words "rest and residue," but to property given previously to the gift either of the residue or the legacies. My Lords, I confess it seems to me that the rule is one of extremely good sense. If any person, unfamiliar with the technicalities of the law, were to read a will to this effect, the testator gives a certain portion of his property to one person, and devises all the rest of his property to another, I cannot doubt that his opinion would be, that "the rest" must be construed to mean that which remains after what has previously been given is withdrawn. The distinction which is relied upon by the Attorney-General is, I think, a distinction which is founded, not upon general principles, or upon the ordinary sense of mankind, but entirely upon the technical rules of the English law. If a testator, having an estate for nine hundred and ninety-nine years, on leaseholds for years, made a devise of this kind, nobody could imagine but that he intended his personal estate to be subjected to the payment of his legacies; and if part of that estate, instead of being leasehold for nine hundred and ninety-nine years, was in fee, or if, instead of being leaseholds for years renewable according

to custom, it was leases for lives renewable forever, no one could suppose that he meant to distinguish between the two, and that the one should be subject to legacies, and the other not.

I believe, therefore, myself, that the rule is founded in perfectly good sense and justice, and I must honestly confess that I think nothing but the great authority, and still greater ability with which the point has been argued at the bar, would have made it a subject of reasonable doubt.

My Lords, as to the other point, which was hardly argued at the bar, I think when it comes to be considered, the point does not really arise. There is no doubt, I apprehend, that you may infer a power to give receipts and discharges where you have a power of sale, for the purpose of making certain payments; but where there is an absolute gift of the real and personal estate to the ultimate devisee for his own use and benefit, to dispose of it as he thinks fit, in what character is he trustee? If he had accepted the executorship, possibly some argument might have been raised. I do not say that even then that would have made a difference, but in that case possibly some argument might have been raised. But he is not executor; he is in no degree liable for the payment of the legacies; he is in no degree liable for the administration of the assets; he is simply owner of the estate subject to the charge. Even if he had been trustee, I should have doubted very much whether there was any power. If there had been such a power as the Attorney-General suggests, of disposing of the estate as he thinks fit, that would have made it a different question; but these legacies being charged upon the estate at a period which has not yet arrived, and which may never arrive, in what possible right can the owner of this estate say "I will raise this money"? What can he do with it, except keep it in his own hands till the period arrives, if it ever should arrive, at which the legacies would become payable out of the fund? Therefore I have not the smallest doubt in this case that your Lordships ought to affirm the decree of the court below.

*Orders appealed from, affirmed. Appeal dismissed, with costs.*¹

¹ *Greville v. Browne* has in general been followed in the United States. See, *e. g.*, *Lewis v. Darling*, 16 How. 1, 10 (U. S. 1853). Cf. 2 Woerner Amer. Law Adm. (2d ed.) § 452.

In *Lupton v. Lupton*, 2 Johns. Ch. 614 (N. Y. 1817), Chancellor Kent decided that a gift of the residue of real and personal property did not charge legacies on such residue, and the case seems never to have been overruled in New York (see *Brill v. Wright*, 112 N. Y. 129 (1889)); but the Court of Appeals of that State has shown itself astute to discover distinctions to escape the effect of the decision. *Kalbfeisch v. Kallfleisch*, 67 N. Y. 354 (1876); *Hoyt v. Hoyt*, 85 N. Y. 142 (1881); *Scott v. Stebbins*, 91 N. Y. 605 (1883); *Briggs v. Carroll*, 117 N. Y. 288 (1889).

Lupton v. Lupton, has been followed, however, in Connecticut, *Gridley v. Andrews*, 8 Conn. 1 (1830); in Maryland, *White v. Kauffman*, 66 Md. 89 (1886); and in South Carolina, *Laurens v. Read*, 14 Rich. Eq. 245 (So. Car. 1868).

A testator gave pecuniary legacies out of a fund to A and B, and gave the residue of the fund to C. The fund was, in part, needed for debts. Held, that the legacies to A, B, and C abated ratably. *Alsop v. Bowers*, 76 N. C. 168 (1877).

HENSMAN v. FRYER.

CHANCERY. 1867.

[Reported L. R. 3 Ch. 420.]

THIS was a suit by a pecuniary legatee for the administration of the estate of William Curtis, who died in 1857, having by his will, made in 1851, devised the residue of his real estate to the defendant, and having given a legacy of £2,000 to the plaintiff. The will is set out fully in the report of the case in the court below. (L. R. 2 Eq. 627.)

The suit came on to be heard before *Vice-Chancellor Kindersley* in 1864, when he decided on the construction of the will that there was no charge, express or implied, of the legacy on the residuary real estate, and directed accounts accordingly.

The chief clerk made a certificate, from which it appeared that the debts of the testator at the time of his death amounted to £12,968, and that his personal estate amounted to about £5,000. At the date of the certificate all the real estate directed to be sold for the payment of debts had been sold, and the executors had received on account thereof, and on account of the personal estate, £9,444, and had paid debts to the amount of £8,632; and the balance in their hands, with the outstanding personal estate, amounted to £1,410. Including interest and other debts not yet proved, it was stated at the bar that the debts still unpaid would amount to about £7,670, leaving upwards of £6,200 charged on the residuary real estate after the personalty and the real estate directed to be sold for the payment of debts were exhausted.

The suit came on for further consideration upon the certificate, and the Vice-Chancellor Kindersley then decided that by the operation of the Wills Act a residuary devise of real estate was no longer specific, and that therefore the pecuniary legatee was entitled to marshal as against the residuary devisee, and ordered the accounts to be taken accordingly. The decision on this question is reported.

The residuary devisee appealed against this order, and the pecuniary legatee appealed against the original decree in the suit.

Mr. Glasse, Q. C., for the residuary devisee.

Mr. Bristowe (with *Mr. Glasse*).

Mr. Green, Q. C., and *Mr. Shebbeare*, for the legatee.

Mr. Woodhouse, for the trustees of the will.

LORD CHELMSFORD, L. C., after stating the will and the facts, continued:—

In support of the plaintiff's appeal it was contended that the legacy of £2,000 to the testator's granddaughter was either expressly or impliedly made a charge upon the residuary real estate devised to the grandson; that the question was one of intention, and that the testator clearly intended his granddaughter to have her legacy; and,

having given away all his personal estate, he must have known that it would not be paid unless she could have recourse to the real estate. That, although the words "charged in manner hereinafter mentioned" appeared to refer solely to the annuity of £120 given to the testator's wife, yet they were capable of application to a further implied as well as to the express charge. That the case of *Webb v. Webb*, Barn. Ch. 86, showed that an express charge did not exclude another charge by implication, and that the amount of the testator's personal estate being wholly insufficient for the payment of his debts, it must necessarily be inferred that, intending a benefit to his granddaughter, he meant that her legacy should be paid out of the only fund available for the purpose.

There can be no doubt that, according to *Webb v. Webb*, a testator may use express words of charging in one part of a will, and may create a charge by implication in another part of it; but where, in a will, an express charge of a particular debt or legacy is laid upon land, it is a strong indication that the land is not intended to bear any other charge of a like nature. This exclusion of an intention, however, will give way to a necessary implication to the contrary; but, to use the words quoted by Lord Eldon in *Bootle v. Blundell*, 19 Ves. 521, the intention of the testator "must be collected from the words, not from circumstances out of the will; and upon general principles and established rules, not by a liberal power of conjecture upon the supposition of what a man would do in the like circumstances; that the court cannot go into the inquiry, whether the personal estate is sufficient for the payment of all the debts, as that would establish a general rule that, where the personal estate is insufficient, the intention must be taken to be to charge the land." I do not feel myself at liberty to regard the insufficiency of the personal estate to pay the testator's debts as a ground for implying an intention that the £2,000 legacy should be a charge on the real estate. Where the meaning of a will is doubtful, the court may assist its construction by evidence of the state of the testator's property at the time when it was made; but where the words are plain, no such extrinsic aid can be resorted to, to give them a different meaning. In this case, the language of the will is too clear to require or to permit any foreign means of interpretation. The words "charged in the manner hereinafter mentioned," followed by a particular charge, are capable of only one construction; and it would be doing violence to the plain meaning of such words to construe them as if they were to be read "in manner hereinafter expressly or impliedly mentioned." I think that in this respect the Vice-Chancellor's decree was quite correct, and that the plaintiff's petition of appeal must be dismissed.

Upon the question raised by the defendant's appeal, one cannot help remarking that the practical effect of the part of the order to which it is directed is inconsistent with the decree which has just been considered. The Vice-Chancellor rightly decided that the legacy of £2,000 was not

a charge on the residuary real estate, but by his declaration as to marshalling he has virtually made it such a charge. His Honor declared that the residuary estate devised to the defendant, John L. Curtis, ought to be applied in payment of the testator's debts in aid of the legacy, and that the plaintiff, Rebecca L. Hensman, was entitled to be recouped out of the said residuary real estate the amount due in respect of the legacy, thus making the residuary estate which he held to have been not intended to be charged, bear the whole burden and charge of the plaintiff's legacy.

The question to be determined upon the appeal of the defendants is one of importance and difficulty. It is admitted that if the case had arisen before the late Wills Act the legatee would not have been entitled to marshal the assets against the residuary devisee, because the residuary devise would only have passed the specific estate of which the testator was seised at the date of his will. But it is said that the Wills Act has produced an entire change in the nature of a residuary devise of land, and by enacting that every will shall be construed, with reference to real estate (as well as personal), to speak and take effect as if it had been executed immediately before the death of the testator, has taken away the specific character of a residuary devise, and brought it within the operation of the equitable doctrine with respect to the marshalling of assets. It certainly could not have been in the contemplation of the Legislature that by making a will extend to after-acquired property, they were placing a residuary devise of real estate on an entirely new footing as to the administration of a particular branch of equity; nor is it easy to understand why the Act should be supposed to have impressed every residuary devise with a new character, although the testator may not have become possessed of any real estates after the making of his will, merely by enacting that after-acquired estates shall pass by such residuary devise. Suppose the will expressly declared that no real estate subsequently acquired by the testator was intended to pass, the residuary devise would, I presume, be as specific as before the Act; and yet, according to the argument, although the testator had no other real estate at the time of his death than he had when his will was made, by the mere force of the Wills Act that which otherwise would have been definite and specific, is rendered as general and indeterminate as if it were the bequest of a residue of personal property.

Lord Cottenham, in *Mirehouse v. Scaife*, 2 Myl. & Cr. 706, in describing the difference between a gift of personal and of real estate, said: "When a testator gives the residue of his personal estate, he knows that it will be uncertain, till his death, what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges, being to be paid out of it; and the expression necessarily imports what will remain after all charges are defrayed. On the other hand, the testator knows precisely upon what real estate such a

gift will operate, unless there be charges affecting the land beyond what the personal estate can satisfy." Can it then be said that a testator knows less precisely upon what real estate his devise will operate because the Act makes the will speak and take effect from immediately before his death instead of from the date of his will. In both cases the testator knows equally well what real estate he possesses, and in both the whole not previously disposed of is embraced by the residuary devise. Why, then, should the gift be regarded as specific in the one case, and not in the other? It is said that a residuary devise since the Wills Act must be general because at the time it is inserted in the will the testator is ignorant to what property it may eventually extend. But as at the time when, by the Act, the testator is supposed to be speaking it must be certain what real estate will be included in the devise, I do not see how any previous uncertainty in the mind of the testator between the date of the will and the time when it is to take effect can make any difference. In either case it is the essentially precise and definite nature of the subject of the devise which gives it its specific character and not the scope and extent of its operation.

I am aware that in the view I am expressing I am encountering opposite opinions of deservedly high authority; but I cannot think that the Wills Act has indirectly given to legatees any right of marshalling assets as against residuary devisees, which they did not previously possess.

But although I am of opinion that the legatee cannot by marshalling throw the whole of her legacy upon the residuary devised estate, yet neither do I think that she ought to lose the whole in consequence of the exhaustion of the personal estate in payment of the debts. The testator intended that the legatee should have her legacy, as well as the devisee the devised estate. But she will be entirely disappointed if the devisee is not made to bear a proportion at least of the debts which the personal estate was insufficient to satisfy. Vice-Chancellor Knight-Bruce, in *Tombs v. Roch*, 2 Coll. 502, laid down an equitable principle which is applicable to the present case, namely, that "every will ought to be read as in effect embodying a declaration by the testator that the payment of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it unless the instrument discloses a different intention." And, in accordance with the decision of that very learned and able judge in that case, I shall hold in the present case that the legatee and the residuary devisee must contribute *pro rata* to satisfy the debts of the testator which his general personal estate was insufficient to pay.

I must, therefore, reverse the order of the Vice-Chancellor, and declare that the plaintiff, Rebecca L. Hensman, the legatee of the legacy of £2,000, and the defendant, John L. Curtis, the residuary devisee, are liable to contribute to the debts of the testator which his general personal estate is insufficient to satisfy, according to the respective values of the said legacy and of the estates devised. And

there must be an inquiry what are the relative values of the legacy and of the devised estate to each other, and the legatee and the devisee must contribute to the debts of the testator which his general personal estate is insufficient to satisfy in proportion to the values of their respective interests.

COLLINS v. LEWIS.

CHANCERY. 1869.

[*Reported L. R. 8 Eq. 708.*]

JAMES DEW, who died in 1864, by will, made in 1861, gave certain pecuniary legacies, and then devised to the use of his wife for her life all his real estate, situate at Woodlands, in the parish of St. Briavels, Gloucestershire, and after her death he gave the same to his trustees, with all the residue of his real and personal estates, upon trust for his niece for life, with remainder for her children. The executors renounced probate, and the niece, who was the testator's heiress-at-law, became legal personal representative, and finding insufficient personalty to pay the testator's debts, but considerable real estate, she filed this bill for an administration of the trusts. The question was, whether the legacies were payable out of the realty, the pecuniary legatees contending that the legacies were charged upon the real estate in case the personalty should prove insufficient to satisfy them.

It now appeared that the personal estate amounted to the sum of £483 10s. 2d., and the debts of the testator to the sum of £2,063 6s. 8d.

Mr. C. Browne, for the plaintiff, submitted that the legacies were not charged on the testator's realty.

Mr. Hughes, Q. C., for the defendants, the trustees, mentioned the case of *Hensman v. Fryer*, L. R. 3 Ch. 420, and, upon the authority of that case, said that where the personal estate was insufficient for the payment of the legacies the legatees had a right to resort to the realty, or to have the debts marshalled.

Mr. Bedwell, for the testator's widow.

The legatees had been served with notice of this hearing on further consideration, but did not appear.

SIR JOHN STUART, V. C. Upon principle as well as upon authority it is the settled law of the court that the personal estate not specifically bequeathed must be first applied in payment of debts before the real estate which passes under a residuary devise can be resorted to. A pecuniary legatee has no right whatever to call upon a residuary devisee to contribute to the payment of debts.

The decision in the case of *Hensman v. Fryer* is clearly a mistaken

decision;¹ I must therefore decline to follow it. The declaration will be, that these legatees have no right to resort to the real estate for payment of their legacies.²

LANCEFIELD v. IGGULDEN.

COURT OF APPEAL IN CHANCERY. 1874.

[*Reported L. R. 10 Ch. App. 136.*]

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, Law Rep. 17 Eq. 556.

George Lancefield, by his will, dated the 24th of November, 1864, devised all his freehold and leasehold hereditaments to the defendants in trust for his mother, Elizabeth Lancefield, during her life; and he declared that, subject and without prejudice to the life interest of his mother, the trustees should stand possessed of certain freehold hereditaments at Boughton-under-Blean and in Canterbury upon the trusts therein declared for the benefit of his sister, Ann Corbett, her husband and children; and of certain other hereditaments in Canterbury upon the trusts therein declared for the benefit of his sister, Mary Brockwell, her husband and children; and of certain other hereditaments in Canterbury upon the trusts therein declared, for the benefit of his sister, Elizabeth Reynolds, her husband and children; and of certain other hereditaments in Canterbury upon like trusts for the benefit of his niece, Mary Jane Olifent, her husband and children; and of certain other hereditaments in Canterbury in trust for his nephew, the plaintiff, for his life, and after his death for his children; and of certain hereditaments at Wingmore in trust for the plaintiff, his heirs and assigns, forever; and of certain other hereditaments in Canterbury upon the trusts therein stated for the benefit of his niece, Selina Lancefield, her husband and children. And the testator declared that, subject to the life estate of his mother, his trustees should stand possessed of the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments, in trust for his sister, Eliza Lancefield, her heirs, administrators, and assigns; and as to all the residue of his personal estates and effects not thereinbefore disposed of, subject to the payment thereof of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto Eliza Lancefield absolutely.

The testator died on the 17th of February, 1868, and his mother died in April, 1870.

The plaintiff, besides being a specific devisee under the will, claimed to be a creditor of the testator for £400, and filed the present bill

¹ See 9 HARV. LAW REV. 40.

² See, *accord*, *Dugdale v. Dugdale*, L. R. 14 Eq. 234 (1872); *Tomkins v. Colthurst*, L. R. 1 Ch. D. 626 (1875); *Farquharson v. Floyer*, L. R. 3 Ch. D. 109 (1876).

against the trustees for the administration of the real and personal estate of the testator.

The plaintiff's claim as a creditor was disallowed by the Chief Clerk, and a balance was found due from him of £62 6s. 4d.; and the personal estate having been found insufficient for payment of the testator's debts, two questions were argued when the cause came on for further consideration, first, whether specifically devised estates were liable to contribute rateably with the residuary real estate to meet the deficiency of the personal estate; and, secondly, how the costs of the plaintiff's claim as a creditor, which had failed, ought to be borne.

The Vice-Chancellor, Law Rep. 17 Eq. 556, held that the specifically devised estates were not liable to contribute till the real estate comprised in the residuary devise had been exhausted, and directed that the plaintiff should pay his own costs of his claim as creditor, but should not pay any of the costs of the other parties. From this decision the defendants appealed.

Mr. *Miller*, Q. C. (Mr. *Ince* with him), for the appellant.

Mr. *Kay*, Q. C., and Mr. *G. W. Collins*, for the plaintiff.

LORD CAIRNS, L. C.:—

Independently of the state of the law before the Wills Act, independently of the Wills Act, and independently of the construction of this particular will, I should have thought that in all cases there would have been a very strong presumption of an intention on the part of the testator of this kind: that if a man bequeaths a specific portion of personalty to one person and the residue to another person; and if he devises Whiteacre to one person and Blackacre to another, and the residue of his real estate to a third, a different conclusion would be arrived at as to his intention with respect to the payment of his debts in the second case to that which would be arrived at in the first case; because it appears to me that, from the well-known habits of mankind, as every one expects to owe some debts at his death, and expects that his personal estate will be the primary fund for payment of his debts, a man who gives a specific legacy to one person and the residue to another may well suppose that the usual rule of law will apply, and that his debts will be paid out of the residue; but that as to the real estate, there being little expectation that the real estate would be resorted to for payment of debts, a man who devises Blackacre to one person and Whiteacre to another, and the residue to a third, may well be supposed to do so under the belief that he was not only benefiting the specific devisees to the extent of the estates devised to them, but also the residuary devisee to the extent of the residue given to him. But when I look at this particular will, there appear to me well marked reasons for supposing that this view is in accordance with the testator's intention. For the testator having three sisters married and one unmarried, he portions out his real estate among them by giving specific devises to the married sisters and their families, and the residuary real estate to the unmarried sister, and then gives the residue of his

personal estate, after payment thereof of his funeral and testamentary expenses and debts, to the same sister. It is impossible not to see that whether the rule of law was present to the testator's mind or not, he anticipated that the residue of the personality would be the fund out of which the debts would be paid. So far, therefore, as this particular will is concerned, there is nothing to lead us to the conclusion that the residuary real estate was intended to be liable to the debts in preference to the specifically devised estates.

Then as to the question of law. Before the Wills Act the rule of law was as well settled as any rule of the Court, that a residuary devise of real estate was treated as specific, and although the items were not specified, it was considered quite as much specific as if they had been specified. The result of this general rule of law was, that after-acquired real estate would not pass under a general devise. Then the Wills Act stepped in. It was competent for the Legislature to have said that real estate should be treated like personal estate for all intents and purposes; but this was not done. The provisions of the Act were most carefully framed, not by way of altering philosophically the general rules of law, but by taking each particular evil intended to be cured, and dealing with it separately by particular enactments. The Legislature had to deal with the question of a will passing after-acquired property, and it has dealt with it by the 24th section. That section enacts that "every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The effect of that is, as Lord Westbury on one occasion expressed it, that the Legislature attributed to the will a continuing operation as if the devise were repeated every moment until the testator's death; so that as to all the property it must be taken as if he made it the moment before his death. If we realize this hypothesis of the Legislature, the result is that this residuary devise must be taken as having been made the moment before the testator's death, but as a devise specific in its nature. There is nothing in the Act to alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises.

Then with regard to the state of the authorities, it appears that Vice-Chancellor Kindersley and the late Master of the Rolls took a different view from that which I have expressed, and that Vice-Chancellor Stuart, Vice-Chancellor Hall, and Lord Hatherley, when Vice-Chancellor, took the opposite view. But I feel bound to say that I look upon *Hensman v. Fryer*, Law Rep. 8 Ch. 420, decided by Lord Chelmsford, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the judge who was then the head of this court, that the Wills Act had made no alteration in the law in this respect. Therefore,

both on principle and authority, I feel bound to come to a different conclusion from the Vice-Chancellor in this case, and his decree must be altered accordingly.

With respect to the other point, the plaintiff fills the double position of a beneficiary and a creditor, and maintaining his position as a beneficiary, is entitled to his costs in that capacity; but having failed in his claim as a creditor, he ought to pay the costs of that part of the case. He must pay the costs of the defendants of the proceedings occasioned by that claim, and set them off against such other costs as are due to him.

SIR W. M. JAMES, L. J. : —

I am of the same opinion on both points. I well recollect the decision of Lord Chelmsford in *Hensman v. Fryer*, Law Rep. 3 Ch. 420, and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment, namely, that the Wills Act said that the will was to be construed as if it had been made just before the testator's death, and the Court had only to consider what would have been the consequence if it had been so made.

But independently of that, I think that the decision of Lord Chelmsford is binding upon the other branches of the Court. It was a decision deliberately pronounced for the purpose of settling the differences which existed between the various branches of the Court, and I think it ought to have been treated as settling the question.

HAYS v. JACKSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1809.

[Reported 6 Mass. 149.]

THE petitioners alleged, and proved by the requisite documents from the probate office, that the personal estate of the testator was insufficient, by the sum of 66,000 dollars, for the payment of his just debts and legacies, and thereupon prayed that they might be licensed to convey so much of the real estate, of which he died seised, as should be sufficient to pay these debts and legacies, with the charges of sale.

Upon notice ordered, the heirs at law appeared, and sundry questions arose, all of which are discussed in the following opinion of the court, which was delivered by

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following dispositions of his estate : —

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also he gives to his sister Susanna Gray, in fee, certain specific real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and

his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan, in fee, *all the remaining* part of his estate, real and personal, of which he might die seised, or which might afterwards descend to him, by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

And he appoints Judah Hays and Elisha Sigourney, his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law, are before us.

The testator was seised of other real estate than that specifically devised to Mrs. Gray, when he made his will; and he afterwards acquired other real estate, which, on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate, left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorized, on this petition, to marshal the assets, and if we are, in what manner they are to be marshalled, are the questions before the court.

The case may at first be considered as at common law, and according to the equitable rules established for marshalling assets, where there is a will.

At common law, the lands of a testator are not assets, in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator in devising his lands without charging them with the payment of his debts, the Statute of 3 & 4 W. & M. c. 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that Statute, all the lands of the testator, whether they descend or are devised, are charged by law with the payment of creditors by specialty, who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors by specialty, who have been paid out of the personal estate. These rights of the creditors remain uncontrolled by any provisions which a testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid, by which regulations they will be bound.

And the general rule in equity for marshalling assets is thus settled: 1. The personal estate, excepting specific bequests, or such of it as is exempted from the payment of debts. 2. The real estate which is appropriated in the will as a fund for the payment. 3. The descended estate, whether the testator was seised of it when the will was made, or it was afterwards acquired. 4. The rents and profits of it, received by the heir after the testator's death. And, 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested.

The laws of this Commonwealth, applicable to this subject, may next be considered. And here all the personal estate of the testator, and all the real estate, of which he died seised, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty. Also by the Statute of 1783, c. 24, § 10, all estate, real or personal, undevise in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevise estate, or whether he shall administer it, *ex officio*, as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, *according to the will*, and on undevise estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevise personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will, in trust, — first, to pay the debts, and then the legacies; and if any remained, it was his own, unless the testator, by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the Statute above cited removed all doubt; and the executor is now, in all cases, trustee of the undisposed residue for the next of kin.

As to the distribution of undevise lands, this section is merely affirmative of the common law, which gives to the heir all undevise estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts; and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision, applicable to this subject, in the 18th section of this Statute, where it is enacted, that whenever a testator in his

will shall give any chattels or real estate to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees, or heirs, shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our Statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest that the testator may bind, by his dispositions, his legatees, devisees, and heirs.

Hence result the right and duty of the court, in the due exercise of its jurisdiction, so to marshal the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect rights of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law, has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specific devise, and thus drive the specific devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshalled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate, personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts, in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specific bequest of any chattel, and no exemption of any part of the personal estate from the payment of debts. Therefore the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the Government (if any), is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specific devise, not liable, by the terms of it, to any deduction. The descended estate must then be applied to the payment of the debts, before the specific devise can be resorted to. And the same rule must apply to the lands which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specific within the intention of the rule.

Jackson first provides that his debts and funeral charges be paid. He next bequeaths legacies to his nephews and nieces, and makes a

specific devise to his sister, Susanna Gray. Then he gives to Mrs. Swan, in fee, all the remaining part of his estate, real and personal; the just construction of which is, "when my debts and funeral charges, and the legacies, are paid, and the specific devise to my sister is deducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot therefore consider this devise of the remainder as specific. It is rather creating a fund for the payment of the debts and legacies, with a devise of what remains, if any, to the residuary devisee. If, after the personal estate was exhausted by the debts, the unsatisfied creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the Statute, because a general residuary legatee cannot have contribution, if nothing remains. For in that case nothing is given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given; and if, after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being, in fact, no object on which it could operate.

Thus, when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief; but the money secured is considered as a deduction from the property devised. But the case of *King v. King et Al.*, 3 P. Wms. 358, is in point. There the testator, being seised of freehold lands, and of a copyhold, which last he had mortgaged, devised the copyhold to his nephew; and *after all his debts were paid*, he devised the rest of his estate, real and personal, to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then, and then only, he should be entitled to the residue. We cannot, therefore, consider this residuary devise to Mrs. Swan as specific, within the rule of marshalling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case it ought not to apply, because in the residuary devise the testator gives, not only all his real and personal estate, of which he was then seised and possessed, but all of which he might afterwards die seised; and, therefore, that he contemplated after-acquired estate, which, although it could not pass by his will, yet was evidently intended to pass; and that this intent ought to be so far executed as to cause it to be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator

cannot, in his will, charge with the payment of his debts after-purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law cannot affect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises; for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seised or possessed. We think, therefore, that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows:—

Ordered that the said executors be, and they hereby are empowered and licensed to raise the sum of by sale at public auction of the houses, lands, or tenements, of which the said Henry Jackson died seised in fee, being devised by him by his last will and testament; excepting such part thereof as is therein devised in trust for his sister, Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for, any other person or persons; the said sum, when raised, to be applied to the payment of the debts aforesaid, with the incidental charges of sale; and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at public auction of so much of the real estate of which the said Jackson died seised, not having devised the same in and by his last will and testament, such further sum of money, as with the money raised by the sale first above ordered, will amount, in the whole, to the said sum of to be applied as aforesaid, giving bond, &c.

Otis and Sullivan, for the petitioners.

Prescott and Jackson, for the respondents.¹

¹ "It seems by the English authorities, that residuary devises have been regarded as specific, on the ground that a testator could dispose only of the lands owned by him when his will was made, and therefore that a residuary devise was a gift of such lands only; and that the lands devised were subject to the rule of marshalling assets, which leaves specific devises untouched, if the general legacies and devises are sufficient, with the other property, to pay the testator's debts. 2 Jarman on Wills, 547. It may well be doubted whether this rule of the English law was ever adopted in this Commonwealth. For though Parsons, C. J., seems to have recognized it, incidentally, in *Wyman v. Bridgen*, 4 Mass. 151, cited by the plaintiff's counsel, yet in the subsequent case of *Hays v. Jackson*, 6 Mass. 149, he held that a residuary devise, like that which was made to the present plaintiff, could not be considered as specific, within the rule of marshalling assets. And the court, upon a petition for license to sell real estate for the payment of a testator's debts, ordered the estate, given to the residuary devisee, to be sold, before selling that which was specifically devised.

"But we are of opinion, that since the Rev. Sta. c. 62, § 3 ["Any estate, right or interest in lands, acquired by the testator, after the making of his will, shall pass thereby in like manner, as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will, to have been the intention of the testator"], have enabled testators to devise lands acquired after the making of their wills, by clearly manifesting, by their wills, their intention so to do, the English rule above mentioned, if it ever was in force here, can exist no longer."—*Per METCALF, J.*, in *Blaney v. Blaney*, 1 Cush. 107, 116 (Mass. 1848).

GELBACH v. SHIVELY.

COURT OF APPEALS OF MARYLAND. 1887.

[Reported 67 Md. 498.]

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before ALVEY, C. J., STONE, MILLER, ROBINSON, and BRYAN, J.

C. D. Barnitz, for the appellant.

Samuel D. Schmucker, for the appellees.

ALVEY, C. J., delivered the opinion of the Court.

This case was brought to obtain a judicial construction of the will of George Gelbach, Jr., deceased, and to have determined the rights of certain parties thereunder. George Gelbach, the testator, died in Feb. 1880, leaving a widow and two children, and four grandchildren, all provided for in his will, which was duly admitted to probate. The father of George Gelbach, Jr., had died in 1879, leaving three children, including George, as his only heirs and distributees, and he left a small estate, consisting of real and personal property in Pennsylvania, where he died, and some real property in the City of Baltimore.

George Gelbach, Jr., by his will, after giving some few legacies, made the two following bequests:

“Item. I give and bequeath out of the portion or share of my father’s estate that may come to me, one thousand dollars to my brother, Joseph Gelbach.”

“Item. I give and bequeath (out of the share or portion of my father’s estate that may come to me) one thousand dollars to my sister, Elizabeth Shively.”

He then devised and bequeathed all the rest and remainder of his estate, real and personal, to be divided into three equal parts, one of which parts he gave to his wife absolutely, and the other two-thirds he gave to his two children in equal parts, in trust for life, with remainder to their children.

The estate of the father of the testator was settled after the death of George, and the proceeds of that estate, both real and personal, (with the exception of some railroad stock, distributed in the life-time of George,) were distributed, and the portion thereof distributed as George’s share was paid over in equal parts to Joseph Gelbach and Elizabeth Shively, on account of the legacies to them under their brother’s will. The amounts received, however, from the estate of the father, was not equal to the amount mentioned in the bequests to them by the brother; and they now claim that the balance of such amounts shall be made up from the general personal estate of George, the testator. And whether such claim can be maintained, depends upon the nature and distinctive character of the bequests — whether they are so far of a specific charac-

ter as to be *exclusively* dependent for their payment upon the sufficiency of the estate or fund referred to as the source of payment, and *out of which* the amounts were given, or whether they are of the character denominated *demonstrative* legacies?

Ordinarily, a legacy of a sum of money is a general legacy; but where a particular sum is given, with reference to a particular fund for payment, such legacy is denominated in the law a *demonstrative* legacy; and such legacy is so far general, and differs so materially in effect from one properly specific, that if the fund be called in or fail, or prove to be insufficient, the legatee will not be deprived of his legacy, but he will be permitted to receive it out of the general assets of the estate. *Dugan v. Hollins*, 11 Md. 77. But such legacy is so far specific that it will not be liable to abate *with general* legacies, upon a deficiency of assets, except to the extent that it is to be treated as a general legacy, after the application of the fund designated for its payment. *Mullins v. Smith*, 1 Drew. & Sm. 204; 2 *Wm's Ex'rs*, 995.

The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or as one dependent *exclusively* upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. *Creed v. Creed*, 11 Cl. & Finl. 509. For although the personal estate of the testator is the primary fund for the payment of legacies generally, particular legacies may be so provided for as to be charged upon a particular fund or estate exclusively. As was said by the Lord Chancellor, in *Saville v. Blacket*, 1 P. Wms. 779, "it is possible for a legacy to be charged in such manner upon a certain fund, as that upon its failing, the legacy shall be lost."

Here, the bequest is of a \$1000 out of the testator's share or portion of his father's estate. Does this amount to anything more than a testamentary assignment or relinquishment of the testator's interest in his father's estate, to the extent of the legacies mentioned, in favor of his brother and sister, if his interest should prove to be of that amount? The language of the bequests would seem clearly to negative the idea that the testator intended that any portion of these legacies should be paid out of his general personal estate (apart from that acquired from his father); and he manifestly supposed that his share in his father's estate would be sufficient to pay the amounts mentioned by him. The amount necessary to pay the balance of these legacies, if they are to be paid out of the general personal estate of the testator, would have to be raised out of the portions given to the testator's wife and children; and we are clearly of opinion that such result would contravene the intention of the testator, as manifested in the general scheme of the will, and by the terms of the bequests themselves.

It is certainly true, as a general proposition, as was said by the Vice-Chancellor in *Dicken v. Edwards*, 4 Hare, 276, that where a testator bequeaths a sum of money in such a manner as to show a *separate and independent intention* that the money shall be paid to the

legatee *at all events*, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. But where the legacy is so specific and so connected with the fund appointed for its payment as to give rise to the inference that the legacy would not have been given but for the fund as a means of payment, there the legacy will fail with the failure of the fund. *Mann v. Copland*, 2 Madd. 223, 226; *Dicken v. Edwards*, 4 Hare, 276; *Creed v. Creed*, 11 Cl. & Fin. 509. See, also, *Hancox v. Abbey*, 11 Ves. 179.

In our opinion it is clear, that the legacies given to the brother and sister are not general legacies in the sense that they are, to any extent, payable out of the general personal estate of the testator, apart from the fund out of which they were made payable; and that, to the extent of the deficiency of that fund to pay such legacies in full, they must fail.

It follows that the decree of the 28th of March, 1887, requiring the balance supposed to be due on the two legacies mentioned to be paid out of the general assets of the estate, must be reversed, and the cause be remanded.

*Decree reversed, and cause remanded.*¹

NOTE.—On the exoneration, in general, of the personalty by the realty, see *Inchiquin v. French*, 1 Cox, 1 (1745); *Watson v. Brickwood*, 9 Ves. 447 (1804); *Boote v. Blundell*, 1 Mer. 193 (1815); *Kilford v. Blaney*, L. R. 29 Ch. D. 145 (1885); *Lee, Appellant*, 18 Pick. 285 (Mass. 1887).

On the apportionment of the charge of a debt or legacy when laid on a mixed fund of realty and personalty, see *Stocker v. Harbin*, 3 Beav. 479 (1841); *Elliot v. Dearsley*, L. R. 16 Ch. D. 322 (1880).

On applying to the payment of debts land devised to the heir, see *Biederman v. Seymour*, 3 Beav. 368 (1841).

NOTE.—General pecuniary legacies, not supported by a valuable consideration, abate ratably, unless the testator has indicated an order of precedence. *Attorney-General v. Robins*, 2 P. Wms. 23 (1722).

A legacy in lieu of dower has no priority if the testator had no real estate, *Acey v. Simpson*, 5 Beav. 35 (1842); or none subject to dower, *Roper v. Roper*, L. R. 3 Ch. D. 714 (1876). But if the widow has a right of dower, and relinquishes it for a legacy given in lieu thereof, such legacy takes precedence over other general pecuniary legacies, *Blower v. Morret*, 2 Ves. Sen. 420 (1752); *Davenhill v. Fletcher*, Ambl. 244 (1754); *Heath v. Dendy*, 1 Russ. 548 (1826); *Towle v. Swasey*, 106 Mass. 100 (1870); and also over specific legacies. *Borden v. Jenks*, 140 Mass. 562 (1886). See also *Farnum v. Bascom*, 122 Mass. 282 (1877).

Similarly, of a legacy given to a creditor in satisfaction of all claims. *Daries v. Bush*, Youngs, 841 (1881); *McLean v. Robertson*, 126 Mass. 537 (1879); *Duncan v. Franklin*, 43 N. J. Eq. 143 (1887).

A legacy to an executor for his care and pains has no priority. *Fretwell v. Stacy*, 2 Vern. 434 (1702); *Heron v. Heron*, 2 Atk. 171 (1741); *Clayton v. Akin*, 38 Ga. 320 (1868). But cf. *Harper's Appeal*, 111 Pa. 243 (1885).

A legacy of a sum of money to be laid out in land is general. *Hinton v. Pinke*, 1 P. Wms. 539 (1719). And so of the gift of an annuity. *Hume v. Edwards*, 3 Atk. 603 (1749); *Wroughton v. Colquhoun*, 1 De G. & Sm. 357 (1847); *Miller v. Huddleston*, 8 Mac. & G. 513 (1851); *Emery v. Batchelder*, 78 Me. 233 (1886).

In *In re Turnbull*, L. R. [1906] 1 Ch. 726, a testator bequeathed numerous

¹ Cf. *Byrne v. Hume*, 86 Mich. 546 (1891).

pecuniary legacies and directed that all the legacies should be paid "free from duty." Her estate was insufficient to pay all the legacies and duties in full. *Held*, that the legacy duty payable on each legacy must be treated as an additional legacy, and be added to the legacy for the purposes of abatement.

B. *Exoneration of Mortgaged Property.*

ONEAL v. MEAD.

CHANCERY. 1721.

[Reported 1 P. Wms. 693.]

ONE seised of a real estate in fee, which he had mortgaged for £500, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife.

The question was, whether there being (as usual) a covenant to pay the mortgage moneys, the leasehold premises devised to the wife should be liable to discharge the mortgage?

Obj. The personal estate is the natural fund for debts, and according to the decree made by his Honor in *Sir Peter Soame's Case*, where the father the mortgagor dying intestate, and leaving a mortgage upon his real estate made by himself, the personal estate was applied to pay off the mortgage, whereby the younger children were left destitute: so by the same reason, in this case, the leasehold, though specifically devised to the wife, yet being personal estate, must be liable to pay the debt due by the mortgage; especially in favor of the heir, who otherwise would be very slenderly provided for, and in a worse condition than his younger brothers.

But the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], after taking time to consider of it, and being attended with precedents, decreed that as the testator had charged his real estate by this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended. That by such construction each devise would take effect, (viz.) the leasehold estate go to the devisee thereof, and the heir enjoy the freehold, though subject to the burden with which the testator in his lifetime had charged it; and this resolution did not in the least interfere with that of *Clifton and Burt*, 1 P. Wms. 678, because in the latter there was no mortgage.¹

¹ See *Halliwell v. Tanner*, 1 Russ. & Myl. 633 (1830).

SERLE v. ST. ELOY.

CHANCERY. 1726.

[Reported 2 P. Wms. 386.]

ONE seised in fee of lands near Godalmin in Surrey, that were in mortgage, and likewise seised in fee of other lands, devised his lands in Godalmin to his cousin and god-daughter Jane Styles at her age of twenty-one, *subject to the encumbrances that were thereupon*, and ordered that the rents and profits of the premises should, during the infancy of his said god-daughter, be paid to her father for her sole use, and devised other lands to trustees, in trust to pay the testator's debts.

Obj. The lands in Godalmin are devised *subject to the encumbrances thereupon*, for which reason the devisee must take them *cum onere*, and be contented to pay off the mortgage.

MASTER OF THE ROLLS [SIR JOSEPH JEKYLL] *contra*. The devise of the estate subject to the encumbrance is no more than what is implied, for the testator could not do it otherwise; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage of Godalmin is part of those debts which are to be paid off out of the money arising by sale of the trust-estate; and this is the stronger, by the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father for the sole use of the infant, which is as much as to say, that they shall not go or be applied in discharge of the mortgage.

And though the infant by her own bill had submitted to pay off this mortgage, yet his Honor said, he must take care of the infant, and not to suffer her to be caught by any mistake of her agent.

Wherefore paying the costs of the day, let the infant amend her bill.¹

¹ See *Hale v. Cox*, 3 Bro. C. C. 322 (1791); *Waring v. Ward*, 5 Ves. 670 (1800); 2 Jarm. Wills (5th ed.) 1445.

A devisee of land which the testator has mortgaged is entitled to exoneration out of land descended to the heir. *Galton v. Hancock*, 2 Atk. 424 (1742). *Wride v. Clark*, 2 Bro. C. C. 261 n.

EVELYN v. EVELYN.

CHANCERY. 1732.

[Reported 2 P. Wms. 659.]

UPON a bill brought by the plaintiffs, the three infant daughters of George Evelyn by Mary his wife, for raising their portions of £8,000 (the eldest of the said daughters being about the age of eight years) the case was thus :¹

George Evelyn the defendant's father (and grandfather to the plaintiffs) had three sons John, George, and the defendant Edward Evelyn.

George Evelyn the father being tenant for life, remainder to his eldest son John in tail male, of part of the premises, on the 20th October 1698, together with his eldest son John, by deed and recovery settled the manor of Walkhamstead alias Godstone in Surrey, to the use of himself for life, *sans* waste, remainder to his eldest son John Evelyn for life, remainder to his first, &c. son in tail male successively, remainder to his second son George Evelyn for life, remainder to his first and other son in tail male successively, remainder to his third son the defendant Edward Evelyn in like manner, with trustees to support all these contingent remainders, remainder to the heirs male of the body of George Evelyn the father, remainder to him in fee; with a power to George Evelyn the father by deed or will, to charge by lease, mortgage or otherwise, the premises to himself limited for life, with raising or paying any sum not exceeding £6,000, with farther power to his said sons, respectively, when in possession, to make any lease or leases for years for the raising of portions for the daughters of such sons.

By other indentures of lease and release dated the 20th and 21st of October 1698, George Evelyn the father, in consideration that his son John Evelyn had joined with his father in the said common recovery and settlement, did settle other lands, (*viz.*) the manor of Tandridge, &c. of which he was seised in fee, to the same uses as the said manor of Walkhamstead alias Godstone was settled by the former deed.

Upon the 1st of April 1699, George Evelyn the father, in pursuance of his power, mortgaged part of the said land for £1,500 for the term of 1,000 years, which mortgage afterwards by mesne assignment became vested in Sir Thomas Pope Blunt, with a covenant from George Evelyn the son for payment of the mortgage-money, and Sir Thomas the mortgagee covenanted to re-assign to George Evelyn the son. In June 1699 George Evelyn the father died. In October 1703, John Evelyn

¹ This case is abbreviated from the report, only that part which relates to the question of the mortgage being given.

the eldest son died without issue, upon which George Evelyn the second son entered upon the premises comprised in the settlement.

August 22d 1720, upon the intermarriage of George Evelyn the son with the daughter of Mr. Garth, George Evelyn, by indenture, granted and leased to trustees all the premises in the settlement, to hold to them for the term of 500 years for the purpose of raising £8,000 for the portions of the daughters of the marriage.

The marriage took effect ; but afterwards in the year 1724 George Evelyn died intestate, leaving the defendant Mary his widow and only three daughters, who by their mother in the year 1725 brought their bill against Edward Evelyn and James Evelyn his eldest son (being the next remainder-man in tail) praying a present sale of the 500 years term to raise the portions, the eldest daughter being not above four years old at the time of bringing the bill ; and on the other hand the defendant Edward Evelyn and his son (the next remainderman in tail) brought their cross bill against Mrs. Evelyn the mother (afterwards married to Governor Bohun) being the administratrix of her former husband George Evelyn, praying that the personal estate of her late husband should be applied towards paying off the mortgage of £1,500, and in exoneration of the real estate.

These causes coming on at first before the *Master of the Rolls* in the absence of the *Chancellor*, he was pleased to declare, that the powers in the deeds of the 20th and 21st of October 1698 were well executed, and directed, that it should be referred to the Master to state the value of the real, and also of the personal estate of George Evelyn the late husband of Mary ; whereupon the Master stated the real (beyond the jointure) to be £91 *per annum*, the personal estate to be about £4,000 and the debts (besides the mortgage) to be about £200 and afterwards these causes being ordered to be set down for hearing before the Lord Chancellor upon the Master's report, and for further directions, and upon the petition of Edward Evelyn and James Evelyn his son to his Lordship, alleging that they apprehended themselves aggrieved by such part of his Honor's decree, whereby the powers in the deeds of the 20th and 21st October 1698 were declared to be well executed, in regard the petitioners conceived that however the term might be well raised, yet that the said powers touching the trusts were not well declared, nor well executed or warranted by the above-mentioned deeds : it was therefore ordered that these causes should be set down to be re-heard touching the matters in the petition mentioned, at the same time that the matter of the Master's report was set down for hearing.

And now the cause standing for judgment in the paper, the LORD CHANCELLOR [KING], assisted by the LORD CHIEF JUSTICE RAYMOND and MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], delivered the resolution of the court.

First. As to the question, whether the personal estate of George Evelyn the son should be applied to pay off the mortgage made by

George Evelyn the father, in regard the son covenanted to pay this mortgage money, whereupon the mortgage was to be re-assigned to him, or as he should direct:

It was agreed that the personal estate of the son should not be applied to pay off this mortgage made by the father, forasmuch as the charge was made by George Evelyn the father in pursuance of his power to charge the premises; and as he had such power, the defendant Edward must be contented to take the land *cum onere*; that this being the original debt of George Evelyn the father, though his personal estate, if any such were to be found, would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt; and notwithstanding that the son did afterwards, on the assignment to Sir Thomas Pope Blunt, covenant to pay the mortgage money, yet since the land was the original debtor, this covenant from the son would be considered only as a surety for the land; that it was not like the case of *Sir John Napier* [5 Bro. P. C. (Toml. ed.) 221], where part of the estate of Sir John the mortgagor, was after his death settled by a private Act of Parliament in trustees as a fund to pay all his debts, and Sir Theophilus the son and heir of Sir John disposing of that fund, was consequently answerable for the debts, having had the benefit of the fund set apart for them, for which reason it was but just that upon his death his personal estate should be answerable for the debts of his father; whereas in the present case here was no fund for payment of debts that came to the son, but the land was the original debtor, and must continue so, there being nothing substituted in its place; that in the common case where a mortgagor covenants to pay and dies, though *quoad* the mortgagee, the land may be looked upon as the security on which he relies, yet if the mortgagor covenants to pay and does receive the money, he is the original debtor, and his personal estate shall go to ease the land in favor of the heir. But here George Evelyn the son was not the original debtor, his father was, who actually received the money; that in the case of the *Earl and Countess of Coventry* [2 P. Wms. 222], where Gilbert late Earl of Coventry on his marriage with the daughter of Sir Strensham Masters, (the earl being but tenant for life with a power to make a jointure of lands not exceeding £500 *per annum* on any wife he should marry) covenanted in consideration of the intended marriage, that he or his heirs would after the marriage, according to the power given him by his father's will or otherwise, settle lands of £500 *per annum* on his wife for her jointure; and it being in proof that the late earl directed his steward to look over his rent-rolls for a fit parcel of the estate to make good the jointure, and afterwards the jointure deed was drawn and engrossed, but not executed; though this depended only on a covenant, yet the jointure of land being the chief thing in view, the decree was, that the land should be settled, and the covenant not made good out of the personal estate. In like manner, in the case of *Freeman and Edwards* [2 P. Wms. 435], though the wife's jointure and the daughter's portion were

secured by articles which were never completed by a settlement, however those articles being to settle lands, and the covenantor leaving lands sufficient to answer it, it was decreed that the daughter's portion should be raised out of the lands, and the personal estate of Mr. Freeman the covenantor not be applied in exoneration of the land. So that as to that part of the cross bill, which prayed the mortgage-money should be paid out of the personal estate of George Evelyn the son, the same was dismissed with costs.¹

LUTKINS v. LEIGH.

CHANCERY. 1734.

[*Reported Cas. Temp. Talb. 58.*]

BENJAMIN KNIGHT having mortgaged his freehold lands to Mr. Ainscomb for securing the sum of £2,500 in 1729, made his will in these words: "As touching my worldly estate, after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in Kent to my wife for life, chargeable with an annuity of £80 for life to Elizabeth Knight;" and after his wife's death he devises his said freehold estate, so charged, to the children of his three sisters, and directs the residue of his personal estate to be placed out at interest; his wife to have the interest during her life, and after her death to be divided among the children of his three sisters; and gave his wife £1,500, with a proviso that the devise and bequests in the will should be accepted by the wife in lieu of her dower, and in full satisfaction of her share of the personal estate.

The question was, whether the personal estate should be applied in exoneration of the real, so as to defeat the pecuniary legatees; there not being sufficient to pay the £1,500 in case the personal estate should be applied in exoneration of the real.

Mr. Attorney-General, for the widow.

LORD CHANCELLOR [TALBOT]. This point has been so far determined, that it seems quite settled and clear; where a man leaves his real estate charged, the legatees and simple contract creditors have a right to stand in the room of bond creditors, if these latter run away with the personal estate; and this in order to do justice both to the testator's intent, and likewise to the creditors. Indeed where the contest is between the heir and executor, and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied; but that is only where no prejudice is done either to a simple contract creditor or legatee: and had there been no devise of the land in this case, the widow and the other legatees would have had a right to apply to this court, and to stand in the room of the

¹ See, *accord*, *Lucam v. Mertins*, 1 Ves. Sen. 312 (1749); *Ancaster v. Mayer*, 1 Bro. C. C. 454 (1785).

mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate, as he had out of the personal: but here the real estate is devised away; which gives the legatees rather a stronger claim than when they have to do with an heir-at-law; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir-at-law; though at last he has prevailed where there is no damage done to a third person: but it has been endeavored here to put him in a better condition than the heir; and to that end has been cited 1 Salk. 416. There is a great difference between that case and this; for, a bond affects not the real estate in the testator's hands; nor did it the devisee, until the Statute of Fraudulent Devises; nor, before that Statute, did it affect the heir, if he had aliened before the writ brought: but in case of a mortgage, that is a lien upon the land both in the hands of the testator and the devisees, and in whose hand soever the land comes. Thus the court has gone as far as is reasonable, viz., to put the *hæres factus* in as good a plight as the *hæres natus*; but not in a better. So the legatees must have the legacies out of the personal estate in case the mortgagee keeps to the real; and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payment.¹

TWEDDELL v. TWEDDELL.

CHANCERY. 1786.

[Reported 2 Bro. C. C. 101.]

THIS bill was filed by Francis Tweddell, devisee for life of an estate called High Laws, under the will of John Aynesley his grandfather, and John Tweddell eldest son of Francis, against the personal representatives and next of kin of John Aynesley, praying, amongst other things, to have the personal estate of John Aynesley aforesaid, applied in discharge of a mortgage subsisting upon the High Laws estate. And the case made by the bill was as follows:

That by indentures of lease and release, by way of mortgage, dated the 9th and 10th of February, 1737, the release being made between John Aynesley of the first part, William Aynesley of the second part, and Edward Delaval of the third part, in consideration of £1,776 therein mentioned, to be paid to John Aynesley, for the proper debt of William Aynesley, and £224 therein mentioned, to be paid to William Aynesley by the said Edward Delaval, making together £2,000, the said John Aynesley, with the approbation of William Aynesley, bar-

¹ See *Johnson v. Child*, 4 Hare, 87 (1844). Cf. *Brown v. Baron*, 162 Mass. 56 (1894).

gained and sold the estate called High Laws, &c., to hold to the said Edward Delaval in fee, subject to a proviso for redemption on payment of £2,000 and interest.

That John Aynesley afterwards agreed to purchase the estate of William Aynesley, and thereupon, by indentures of lease and release, of the 29th and 30th of April, 1747, made between William Aynesley of the one part, and John Aynesley of the other part, reciting the mortgage of Delaval, and also reciting, that the said John Aynesley, by articles of agreement entered into between him and the said William Aynesley, had contracted with the said William Aynesley for the absolute purchase of the inheritance of the said premises, and had agreed to pay the sum of £3,500 for the same, in manner therein mentioned; (that is to say) to Francis Blake Delaval (son and heir-at-law of Edward Delaval) all such sums of money as should be due to him, for principal and interest, upon the said mortgage, on the first of May then next; as also to pay, or secure to be paid, to the said William Aynesley, all such sums of money as should remain of the said £3,500 after deducting the money due to Delaval; and also reciting, that, upon the first of May then next, there would be due from the said estate, to the said Francis Blake Delaval, the sum of £2,155 subject and liable to the payment whereof the said John Aynesley was to take the said premises, and which sum being deducted from the £3,500 there would remain in the hands of John Aynesley £1,345 to be paid by the said John Aynesley to the said William Aynesley, on the conveyance being made. It was witnessed, that the said William Aynesley, in consideration of the performance of the said articles on his part, and of the said sum of £1,345 to him paid, or secured to be paid, by the said John Aynesley, did grant, &c., to the said John Aynesley, his heirs and assigns forever, all the said premises, &c., and the common covenants were therein contained, and, in the covenant against encumbrances, the mortgage and securities made to the said Edward Delaval for the £2,000 and interest, were excepted; and the said John Aynesley did thereby, for himself, his heirs, executors and administrators, covenant and agree with the said William Aynesley, his heirs, executors, and administrators, that he the said John Aynesley, his heirs, executors, and administrators, should well and truly pay, or cause to be paid, to the said Francis Blake Delaval, his heirs, executors, administrators, and assigns, the said sum of £2,155 in manner aforesaid, and would at all times thereafter indemnify the said William Aynesley, his heirs, executors, and administrators, and his and their goods and chattels, lands, and tenements, from all costs and charges, &c., in respect of the said mortgage to Edward Delaval.

That John Aynesley, by his will, dated 5th January, 1748, devised the said premises (together with the other real estates), but subject nevertheless to the payment of all his just debts and legacies, to John Reid, his heirs and assigns, forever, to the use of his first son John Aynesley for life, and, after the determination of that estate, to trustees

to preserve contingent remainders, but subject nevertheless, after payment of his just debts and legacies, but not sooner, to permit and suffer the said John Aynesley to receive the rents and profits during his life, and, after his death, to the first and other sons of John Aynesley the son, in tail-male; remainder to the issue-female of John Aynesley the son, as tenants in common; remainder to the testator's two daughters, Mary and Anne, during their lives, as tenants in common; remainder to plaintiff Francis Tweddell (son of testator's daughter Mary) for life; remainder to trustees to preserve, &c.; remainder to the first and other sons of Francis Tweddell in tail-male, with other remainders over; and, after giving some legacies, the testator did thereby charge and make liable the rents and profits of all his real estates, to the payment of all his just debts and legacies; and, after reciting that his estate at High Laws was then in mortgage to Francis Blake Delaval for £2,000, he the said testator did thereby direct and give full power and authority to his trustee John Reid, his heirs and assigns, to take and receive the rents and profits of all his said real estates, as well for the payment to the said Francis Blake Delaval of the debt of £2,000 and the interest thereof, as all his the said testator's other just debts and legacies, and outgoings, in such order and manner as his said trustee should think proper. But the testator made no disposition of the residue of his personal estate.

As to so much of the said bill, as prayed that any part of the personal estate of John Aynesley, the testator, might be applied in payment of the mortgage for £2,000 and interest upon the estate at High Laws, the defendant, John Tweddell, demurred; for that the said plaintiffs have not shown any title to have such personal estate so applied.

This demurrer was argued the 31st July, 1784, when the Lord Chancellor thought it ought to be overruled; but, upon application of defendant's counsel, it was set down to be re-argued; and it was re-argued the 17th and 20th December, 1784; and two questions were made. First, whether from the nature of the contract, the personal estate of John Aynesley was liable to be applied in discharge of the mortgage. Secondly, if it were not so from the nature of the contract, whether John Aynesley had made it liable to be so applied by his will.

Mr. Attorney-General, Mr. Scott, and Mr. Mitford, for the demurrer.

Mr. Madocks and Mr. Lloyd, for the plaintiffs.

The Lord Chancellor directed this cause to stand for judgment the second day of Hilary Term; but, his Lordship's illness intervening, he did not give judgment to this day.

LORD CHANCELLOR THURLOW. This comes before me on a demurrer, and the question is, whether the personal estate shall be applied for the benefit of the heir, in discharge of a mortgaged debt upon real estate. It arises upon the following case (stating the case). The point is, whether the personal estate shall be exempted or not from the payment of this charge. It is a clear rule that the personal estate is never charged in

equity, where it is not at law, and, if not chargeable at law, there is no principle, or case, in this court to warrant its being chargeable in equity, contrary to the order of the law. There is no case expressly decided, upon the subject upon which I am now to give my opinion. However, the grounds, upon which former cases have been decided, apply to the present: particularly that case, where a grandfather bought an estate charged with a mortgage, and it descended to the father; and the father, having occasion to borrow money, charged the estate with that sum, entering into a covenant, charging himself, at law, with the payment. This transaction, certainly, changes the nature of the debt, and makes it his own. This principle I think applicable to the present point. *Cope v. Cope*, 2 Salk. 449, was the first case cited at the law. There is another case in 2 Wms. 659, *Evelyn v. Evelyn*. The principle is more expressly laid down in that case. The land was the original debtor, and the mortgagee could not bring his action against the executor, or any other party, but merely against the original debtor. As to the case in 1 Chancery Cases, 74, nothing more is to be gathered from thence, than the general rule; *Cornish v. Mew*, Ch. Ca. 271; *Pockley v. Pockley*, 1 Vern. 36, show, that where a purchaser of an equity of redemption dies, the personal estate shall not be applied for the benefit of the heir, it not being the ancestor's debt.

Where it is a debt payable by executors, at law, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims, 1 Wms. 347; 2 Wms. 664; 1 Vesey, 312. In respect of the rule of marshalling assets, it is, that it must be a debt affecting both the real and personal estate; so, in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove the executors are accountable at law, and not in equity. There is a case abridged in 6 Brown's Cases in Parl. 520, *Lord Rochford v. Belvidere* (which his Lordship stated). I cannot distinguish that case from this; the House of Lords were of a different opinion to what I entertain upon this case, and therefore I have stated it more at length. The personal estate never was liable, and the party never was liable to an action upon covenant. In that case George had a fee-simple in the estate; he was capable of giving it after the charges were extinguished; however, it was held, contrary to my opinion, that the personal estate was liable. As to the present case, let the demurrer be allowed; as my opinion is that the personal estate never was liable, either by action against the party himself, or against his executors.

*Demurrer allowed.*¹

¹ Affirmed on rehearing. 2 Bro. C. C. 152.

See *Cumberland v. Codrington*, 3 Johns. Ch. 229 (N. Y. 1817); 2 White & T. L. C Eq. (5th ed.) 711, 712.

SCOTT v. BEECHER.

CHANCERY. 1820.

[*Reported 5 Mad. 96.*]

JOHN TYSON being entitled to a copyhold estate to him and his heirs, according to the custom of the manor, mortgaged the same on the 9th October, 1811, to Richard Mills, to secure £1,000 and afterwards surrendered the same to Mills and his heirs pursuant to the covenant in the mortgage deed. Tyson also gave his bond to Mills for payment of the money advanced. The mortgage money was not paid at the appointed time.

Tyson died in November 1814, and by his will, 14th December 1813, devised all his estate and effects to his wife, Elizabeth Tyson, and in particular his copyhold estate, and appointed her executrix; and she proved the will, and was admitted to the copyhold, subject to the mortgage; she died in May 1816, without issue, leaving her brother, the plaintiff, heir at law, according to the custom of the manor.

In February 1819, letters of administration of the unadministered estate of John Tyson were granted to the plaintiff and the defendant Frances Beecher, the wife of the other defendant Alexander Beecher, and upon the death of Elizabeth Tyson, letters of administration of her estate, were also granted to the plaintiff and the said Frances Beecher.

Richard Mills, the mortgagee, threatened to proceed to recover by ejectment the mortgaged premises, whereupon the plaintiff filed the present bill, insisting that he ought to have the mortgage paid out of the personal estate of the mortgagor, he having left assets more than sufficient for that purpose, and the prayer of the bill was accordingly.

The defendants by their answer admitted that the assets of James Tyson were more than sufficient for the payment of his funeral expenses and debts, including the mortgage debt and interest thereon, and that E. Tyson had in her life-time possessed assets of James Tyson more than sufficient to pay all debts, including the mortgage, and that at her death there was also outstanding of James Tyson sufficient to pay the mortgage; but they submitted, that under the circumstances, the plaintiff must take the copyhold estate, subject to and chargeable with the mortgage debt, and that he was not entitled to have the personal estate applied in discharge of the mortgage.

Mr. Pepys and *Mr. Walker*, for the plaintiff.

Mr. Lovatt and *Mr. Palmer*, for the defendants, were stopped by

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] Elizabeth Tyson was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted that she possessed assets sufficient to pay all the debts, including the mortgage, and it may therefore be said that she elected to continue the mortgage as a charge on her real estate. But I appre-

hend this is not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of James Tyson became her personal estate, but the mortgage debt of James Tyson was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate.
*The bill was dismissed with costs.*¹

MIDDLETON v. MIDDLETON.

CHANCERY. 1852.

[Reported 15 Beav. 450.]

THE question arose on the will and codicil of Charles John Middleton. By his will, dated the 28th of February, 1831, he expressed himself as follows: "I desire and direct that all my debts, funeral and testamentary expenses, and all legacies herein mentioned, or which by any codicil to this my will I may hereafter give or bequeath, may, in the first place, be paid and satisfied out of my personal estate, or if that should prove insufficient, out of my real estate; and I hereby charge the same upon my personal and real estates respectively in the hands of my devisees and executors hereinafter named." He then devised his freehold, leasehold, and copyholds "in England, or wheresoever situate, to trustees and their heirs forever, in pure trust, subject to debts, expenses, and legacies, as aforesaid, to suffer and permit" his wife to enjoy them for life, and after her decease, to his brother, H. J. Middleton, for life, with remainders over. He bequeathed all his personal property to his wife absolutely, subject to certain pecuniary legacies. He then, after reciting that he possessed estates in the East and West Indies, devised his lands, &c. in the colonies to his wife and her heirs absolutely, "subject only to payment of debts, expenses, and legacies, as aforesaid; for his will and intention was, to bequeath to her all he possessed, and to create an interest in his lands and real estate in England only, after her decease, as detailed above."

The testator had a copyhold estate at Midanbury, in Hampshire, and a share in a freehold estate in Jamaica. He afterwards purchased two houses in Calcutta, and by a codicil made in 1835, after reciting he had purchased these two houses in Calcutta, he proceeded thus: "Now I desire and direct, that these tenements shall follow the uses of my will now in England, and in the event of my demise, shall become the sole property of my wife, to be enjoyed and disposed of by her as fully and entirely as if I had myself been alive."

¹ See *Ilchester v. Carnarvon*, 1 Beav. 209 (1839); *Clarendon v. Barham*, 1 Y. & C. C. C. 698 (1842); *Bruce v. Morice*, 2 De G. & Sm. 389 (1848); *Swainson v. Swainson*, 6 De G. M. & G. 648 (1856). But cf. *Bond v. England*, 2 K. & J. 44 (1855).

On the 12th of January 1843, the testator borrowed the sum of £1,500 from Messrs. Child, his bankers, and he gave his bond of that date for securing the repayment, together with an equitable mortgage on the Midanbury property.

The testator died in January 1844; and a bill having been filed for the administration of his estate, it was found, that the personal estate was insufficient for the payment of the debts, that a small balance of £15 remained unapplied, and that there was still a debt by simple contract, of £194, and that the debt of £1,500, to Messrs. Child & Co., secured by the bond and equitable mortgage of the copyhold property at Midanbury, still remained unpaid.

The Master, to whom the matter was referred, found, that the English property of the testator was confined to this estate at Midanbury, and that his property abroad consisted of one seventh of one tenth of certain freehold estates in the island of Jamaica, and of one of the two houses at Calcutta, mentioned in his codicil of the 6th of April 1835.

The cause now came on for further directions on the Master's report; and a question was raised between the widow of the testator, on the one hand, and his brother and other devisees in remainder of the Midanbury estate, on the other, whether the devisees of that estate were to take it *cum onere*—that is, subject to this mortgage of £1,500—or whether the estates abroad, devised to the widow absolutely, were to contribute towards the payment of this £1,500 so charged on the Midanbury property.

Mr. Lloyd and *Mr. Selwyn*, for the plaintiff, the widow of the testator.

Mr. R. Palmer, for the defendants.

The Master of the Rolls reserved his judgment.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] The question in this cause arose on the construction of the will and codicil of Charles John Middleton, who made his will on the 28th of February 1831, republished it on the 2d of January 1834, and afterwards executed a codicil to it on the 6th of April 1835.

The will is to this effect: After directing that his real estate shall be liable, in the case of the deficiency of the personal estate, to contribute to the payment of debts and legacies, and after giving some specific and small pecuniary legacies, he devises all his property in England to his widow for her life, and after her decease, to his brother H. J. Middleton for his life, and after his decease, to the eldest male heir of his body absolutely; and in default of any such male heir, he directs the property to be divided between Charles Edward Jerningham and the eldest daughter of H. J. Middleton, as tenants in common in fee simple; then, after reciting that he was possessed of property in the colonies, he gives the whole of his property abroad to his wife absolutely. By the codicil executed by him in 1835, he mentioned that he had purchased two houses at Calcutta, and, that in order that he might not die

intestate with respect to them. he desired them to go to the uses of his will then in England — that is, that they were to go to his wife absolutely. By this codicil, he says nothing respecting the payment of debts and legacies.

The cases of *Oneal v. Mead*, 1 P. Wms. 693, and *Hallivell v. Tanner*, 1 R. & M. 633, were relied upon by the widow, the devisee of the colonial estate, for the purpose of showing, that the devisees of the Midanbury estate must take it *cum onere*, and that they cannot throw any portion of this charge on the other estates. It is the settled rule of this court, that if, in the absence of any special direction, a testator devises an estate to one devisee, and personal property to a legatee, the devisee must take the estate as he finds it; and that if the personal estate should be exhausted by the mortgagee in payment of his debt, the legatee may marshal the assets and stand in the place of the mortgagee, in order to throw that debt on the real estate. This is *Clifton v. Burt*, 1 P. Wms. 679, and there are several other cases to the same effect.

The case of *Oneal v. Mead* simply established, that, as between a devisee of a mortgaged estate and a specific legatee of a leasehold estate, the devisee should not be entitled to have his mortgage paid by a specific legatee.

Hallivell v. Tanner, also relied upon, was to the same effect. Three leaseholds were, in that case, bequeathed to three legatees; one was mortgaged: the two other legatees were held not to be bound to contribute towards the payment of the mortgage charged on the first leasehold estate. These cases are, in truth, instances of the same principle, and of the doctrine already stated. The devisees and legatees are all equally objects of the testator's bounty, and one cannot be permitted wholly or partially to defeat the gift to another, by reason of any rule of law, which makes the property so given to that other legatee previously liable to pay the debts of the testator. These are only instances of giving effect to the intention of the testator found in the words he has used; but this case is distinct from those, and it is, in my opinion, in no further respect governed by them, than by showing that the expressed intention of the testator is to be followed. Here the testator directs, in the first place, that if his personal estate should prove insufficient, his debts should be paid out of his real estate, and the question is, whether the devisees do not take subject to this direction.

In *Carter v. Barnadiston*, 1 P. Wms. 505, which was relied upon for the devisees in remainder of the English estates, it was so determined, in a case where the testator had devised all his real estates to trustees, in trust, out of the profits to pay his debts and legacies; and after these had been discharged, he devised the estates at Orton to one set of devisees, and the estate at Pickworth to another, and he afterwards mortgaged the Pickworth estate. The Orton estate was, in that case, held liable to contribute to the payment of the mortgage charged upon the Pickworth estate.

In *Irvin v. Ironmonger*, 2 R. & M. 531, the will began with a general charge of debts and funeral expenses, and, subject thereto, the testator gave all his freehold, copyhold, and leasehold estates to trustees in trust to pay annuities and legacies, and, subject thereto, in trust for certain persons, in the manner there stated. The Master of the Rolls held, that, so far as the personal estate not specifically bequeathed was insufficient to pay the debts, they must be borne by the freehold, copyhold, and leasehold estates proportionably.

These cases, in my opinion, govern the present; nor am I able to find any well-founded distinction, as applicable to the question before me, between these cases and the present, arising from the circumstance, that there was, in the cases cited, a devise to trustees in trust for the payment of debts, and that in this a charge for the payment of debts is created. That a devise of an estate in trust for the payment of debts, and a charge of debts on the real estate, are distinct in their nature and consequences, is a proposition familiar to every one; but, as applicable to the question before me, they are, in my opinion, the same, if it appear, from the plain import of the words of the will, that the charge of all debts is general upon all the estates of the testator.

I am of opinion, that this is the true import of this testator's will, and that in this case, the real estate generally must bear the expense of paying all the debts, whether they be simple contract debts, or charged on any particular portion of the real estates. In the first place, the will, after containing the general direction, that if the personal estate should prove insufficient, the debts and legacies should be paid out of the testator's real estate, contains a repetition of this direction as applicable to each devise. This is so after the gift of the Midanbury property; and after giving to his wife Eliza all his lands in the colonies, to be held absolutely by her heirs and assigns forever, without remainder to any one, the testator proceeds to say, "subject only to payment of debts, expenses, and legacies as aforesaid."

If I were to hold, that these lands were not to contribute, it would be a violation of these words in the will, and it would be, in effect, to hold, that where the testator has said that the lands shall be subject to the payment of debts, this court may say they shall not, in fact, be so subject.

The after-acquired property in the East Indies is, in my opinion, subject to the same trust, as it passes by the codicil, which directs that the houses, one of which still forms a portion of the testator's property, "shall follow the uses of his will then in England," and must therefore be enjoyed by her as her absolute property, subject to the contribution I have before mentioned. This, therefore, manifestly points to the same end, and to the payment of debts and legacies.

I must declare, therefore, that the Jamaica and Calcutta estates are liable to contribute with the Midanbury estate, to the payment of the £1,500, in proportion to their relative values; and if evidence of such proportionate values be not laid before me, or if the parties interested

do not, or cannot, agree as to the values thereof, I must refer it to the Master to ascertain the value accordingly. The rest of the decree will be of course, and according to the minutes prepared by counsel.¹

HOFF'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1855.

[Reported 24 Pa. 200.]

WOODWARD, J.² The testator devised to his wife, the appellant, for life, the house in which he dwelt on Chestnut Street, together with the policy of insurance and furniture. When he purchased the house in 1847, there was a mortgage resting on it for \$8,400, made by a former owner, and his will is silent in regard to the payment of the mortgage. The executors paid it off out of the personalty, and took an assignment; but the creditor and the Court of Common Pleas refused to allow them a credit for it on the ground that the widow took the estate *cum onere*, and that she must pay the mortgage. She appeals, and the question is whether the mortgage is chargeable on her estate or on the personalty.

The will contains, in the introductory clause, the usual direction as to payment of debts, a phrase which in England is necessary to charge debts on the realty, but wholly unnecessary here, where lands as well as personal estate are bound for every decedent's debts. Still the words "after the payment of my lawful debts," cannot be treated as meaning nothing; and if they are to have any significance, it must be that the executors should pay the debts before distribution be made of the estate in pursuance of the will. A debt secured by a mortgage of the testator's own making, is no less a debt within the meaning of the introductory phraseology of wills than a promissory note; and executors are as much bound to pay the one as the other. The reason assigned in the English cases for throwing such a mortgage upon the personalty, is that the personal estate has been benefited by the making of the mortgage; a reason for which we stand in no need, though it is as applicable here as there. As to the mortgagee, the mortgage is a specific lien, and he cannot be restrained from resorting to the land pledged; and as between him and other creditors, he will often be compelled to do so in relief of other funds; but as between the mortgagor and his representatives, his mortgage is evidence of indebtedness; and where there is nothing in the will to control their action, it is their plain duty to pay it. And to excuse them there must be a clear declaration of intention that the devisee of the mortgaged premises is to take them *cum onere*. Thus it is settled, says Powell, on the authority of a great number of cases (see his work on *Devisees*, vol. 11, page 671), that a devise of

¹ See *Harper v. Munday*, 7 De G. M. & G. 389 (1866).

² The opinion only is given.

mortgaged lands, subject to the mortgage thereon, does not throw the charge on the estate so as to exempt the funds which by law are antecedently liable, as the testator is considered to use the terms merely as descriptive of the encumbered situation of the property, and not for the purpose of subjecting his devisee to the burden.

But how is it where the estate comes to the devisor encumbered by a mortgage made by a former owner? If it come by descent or devise, and the testator has done no act to make the debt his own, his devisee will take the estate *cum onere*, and the executors are not chargeable with the mortgage; and the rule is the same even where the testator has purchased the estate, if he have had no connection, or contract, or communication with the mortgagee, and have done no act to show an intention to transfer the debt from the estate to himself. What dealings will have the effect to make the mortgage his own debt, have been debated in a great variety of cases, several of which counsel have cited in their paper-books. It seems that paying the mortgagee a higher rate of interest, and indemnifying the vendor against the mortgage, both which occurred in this case, are not such acts on the part of the purchaser as make him personally liable for the mortgage-debt. *Shafto v. Shafto*, 2 Cox's P. W. 664; *Woods v. Huntingford*, 3 Ves. 128.

The court below ruled the question on this ground. The learned judge said, it must appear that he (the testator) has done some act by which he has made himself directly liable to the owner of the encumbrance; and then he ruled that the evidence submitted to the auditor was insufficient to shift the obligation from the real to the personal fund. We agree that some act must be shown, indicative of an intention to take the mortgage upon himself, and the court were, perhaps, right in setting aside the evidence of payment of an increased rate of interest, and certainly right in disregarding the declarations of the testator, made to persons having no interest in the subject; but they overlooked one important and decisive fact, which was in full proof before the auditor, to wit, that Hoff purchased not merely the equity of redemption in this house and lot, but the entire interest, and that the mortgage formed part of the price of the estate. The proof was that he bought of William Reynolds and wife for \$13,900; that he paid \$5,500. which, with this mortgage of Elmes to Harvey of \$8,400, was "in full the consideration for the premises." The receipt of Reynolds, indorsed on his deed to Hoff, stipulates, moreover, that the said mortgage and the interest due, and to grow due, thereon are to be paid by the said John Hoff.

Now, it is immaterial whether this amounted to a *covenant* on the part of Hoff to pay the mortgage, though, according to the doctrine of *Campbell v. Shrum*, 3 Watts, 60, and the cases there cited, it might be easy to say it did, but surely there can be no doubt he would be liable to an action for money had and received, at the suit of the mortgagee. As was said in the case of the *Earl of Belvidere v. Rochfort*, cited in 2 Powell on Devises, 679, the plain intent of the deed was to

put the purchaser in the place of the vendor, and that he might not be longer liable to the mortgagee, a sufficient part of the purchase-money was left in the purchaser's hands for satisfaction of the mortgage, the purchaser thereby taking upon himself the vendor's bond and covenant for payment of the mortgage, as fully as if he himself had covenanted to pay it off, and either the vendor or mortgagee might, upon that contract, have compelled him to pay it off. The decree in that case was confirmed by the House of Lords, and though some doubt has been thrown upon it by Lord Thurlow in *Tweddell v. Tweddell*, 2 B. C. C. 107, and by Lord Alvanley, in *Woods v. Huntingford*; still, its good sense is its sufficient vindication, and commends it to our acceptance. Nor is the doctrine of that case destitute of support from authorities of high respectability, as may be seen by consulting *Billinghurst v. Walker*, 2 B. C. C. 608; *Cope v. Cope*, 2 Salk. 449, 2 Ch. Ca. 5; *Pochley v. Pochley*, 1 Vern. 36; *King v. King*, 3 P. W. 360; *Galton v. Hancock*, 2 Atk. 436; *Robinson v. Gee*, 1 Vesey, 251; *Phillips v. Phillips*, 2 Bro. C. 273; *Johnson v. Milkrop*, 2 Vern. 112; *Balsh v. Hyam*, 3 P. W. 455.

If then Hoff, in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remained unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in *assumpsit* if not in covenant; but, not being paid in the lifetime of Hoff, his personal estate had the benefit of it, and it went into the hands of his executors for the payment, first of all, of his "lawful debts." He had no debt more lawful than this mortgage, and there is great precision in the equitable principle which devotes that money in the executor's hands to the satisfaction of this debt.

But that principle is applicable only when there is no controlling testamentary intention expressed. If it were deducible from the whole will, that the testator meant his widow should pay the mortgage out of her life estate, we should be obliged to say so—for the will is the law of his estate. But no such intention is manifest.

It is clear, however, beyond all doubt, that he meant the bulk of his personal estate should go to legatees in the form of pecuniary legacies; and it seems to be settled, that the devisee of a mortgaged estate is not entitled to be exonerated out of personal estate specifically bequeathed: *Neal v. Mead*, 1 P. W. 693. And the same rule, it has been decided, extends to pecuniary legacies: *Lutkins v. Leigh*, Cases in

Time of Talbot, 3; *Hamilton v. Morely*, 2 Vesey, Jr. 65. In *Ruston v. Ruston*, 2 D. 243, s. c. 2 Y. 54, we have a discussion of many of the principles I have adverted to; and, under a devise of mortgaged premises, it was held that the personal estate of the testator shall not go in ease of the mortgaged premises, so far as to defeat specific or ascertained pecuniary legacies, or any part thereof;—*aliter* of the legacies of the residuum.

On this ground the decree of the court can be sustained so far as the ascertained legacies under the will are concerned, but not as to the residuum, and the auditor's report shows that there will be a residuum, though not of sufficient amount to pay off the mortgage. Whatever there is must be applied to the mortgage in ease of the widow's life estate. The auditor distributed this under the 13th clause of the will; but so much of the decree as sustains this distribution must be reversed. If that clause be regarded as a bequest of additional legacies, it is so general and indefinite in terms as not to exempt the portion of the estate to which it applies from contribution to the mortgage.

Williams, for appellant.

Serrill, Guillou, and Fallon, for residuary legatees.

HUNT, PETITIONER.

SUPREME COURT OF RHODE ISLAND. 1895.

[Reported 19 R. I. 189.]

CASE stated for an opinion of the court under the Judiciary Act, cap. 20, § 24.

June 29, 1895. *MATTESON*, C. J. This is a case stated for the opinion of the court. Rowland L. Rose, died intestate September 19, 1894, seized and possessed of a parcel of land on the southwest corner of Bridgham and Greenwich streets in Providence, particularly described in the petition. This parcel of land was formerly owned by Dexter N. Knight who mortgaged it to the Mechanics Savings Bank to secure the payment of his note for \$25,000, dated January 23, 1869. On February 13 following, Knight conveyed the equity of redemption in the mortgaged property to Gorham Thurber who assumed the payment of the mortgage and guaranteed the payment of the mortgage note by a guaranty written on its back. The trustees of the estate of Thurber conveyed the property to Rose subject to the mortgage by deed dated May 11, 1889. The consideration named in this deed was \$10,000, which was the sum paid by Rose for the equity of redemption. He also assumed the payment of the mortgage by a clause in the deed to him as follows: "Said premises are subject to a mortgage of twenty-five thousand dollars (\$25,000) to the Mechanics Savings Bank payment of which is assumed by the grantee." On July 22, 1889, the

Mechanics Savings Bank transferred the mortgage to the Citizens Savings Bank. Rose thereupon as a consideration for the transfer signed an agreement on the back of the note as follows: "Waiving demand, notice and protest, I hereby guarantee the full payment of the within note; future payments of principal or of interest in renewal thereof not releasing me as indorser." The interest on the note has been paid to January 23, 1895. The administrator, widow and heirs at law of the deceased have concurred in stating the foregoing facts to obtain the opinion of the court on the question whether the heirs are entitled to have the mortgage paid out of the personal estate in exoneration of the real, or whether the real estate descended to them subject to the incumbrance of the mortgage.

The general rule as between the real and personal representatives is that the personalty is the primary fund for the payment of debts: and this rule is not changed by the fact that the debt is secured by a mortgage on the realty given by the deceased. *Gould v. Winthrop*, 5 R. I. 321; *Atkinson v. Staigg*, 13 R. I. 725; 2 Williams on Executors, 1042. The rule extends, however, only to incumbrances created by the deceased himself; if the estate has come to him already mortgaged, the estate is the primary fund for the payment of the debt and on his death passes to his devisee or heir at law subject to the incumbrance, unless he has so dealt with the mortgage debt as to make it his own personal debt. *Gould v. Winthrop*, 5 R. I. 321. The question, then, resolves itself into this: Did the deceased, purchasing the equity of redemption, by assuming the payment of the mortgage debt in the manner stated, or by guaranteeing the payment of the note on the transfer of the mortgage from the Mechanics Savings Bank to the Citizens Savings Bank, make the mortgage debt, as between his real and personal representatives, his personal debt?

The assumption of the mortgage by Rose was equivalent to a covenant with his grantors to indemnify them against the mortgage debt, or to a covenant with them to pay the debt. *Mount v. Van Ness*, 33 N. J. Eq. 262, 265. Entering into covenants like these, it is held, does not sufficiently show an intention on the part of the purchaser to transfer the debt from the estate to himself, as between his heir and executor or administrator, to have that effect. *Evelyn v. Evelyn*, 2 P. Wms. 664; *Tweddell v. Tweddell*, 2 Bro. Ch. 101, 152; *Woods v. Huntingford*, 3 Ves. 128; *Butler v. Butler*, 5 Ves. 534; *Waring v. Ward*, 7 Ves. 332; *Earl of Oxford v. Lady Rodney*, 14 Ves. 417; *Barham v. Earl of Thanet*, 3 Myl. & K. 607; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 228; *Keyzey's Case*, 9 Serg. & R. 71, 73; *Mount v. Van Ness*, 33 N. J. Eq. 262. And the rule is the same even though the purchaser has rendered himself liable at law to the mortgagee for the payment of the mortgage debt. *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 229.

Nor was the guaranty on the back of the note by Rose sufficient to manifest an intention on his part to make the debt his own in such wise .

as to change the natural course of assets. It was merely a collateral undertaking in no way affecting the original contract between the mortgagor and the holder of the mortgage, which remained after the guaranty precisely as before.

To have the effect of transferring the debt from the estate on which it is charged to the personal estate, the dealing between the purchaser and the mortgagee must go to the length of changing the terms of the original contract so as virtually to constitute a new contract; as for instance, arranging for different times or modes of payment, or for an additional loan with a new mortgage including the old as well as the new loan, &c. *Billingham v. Walker*, 2 Bro. Ch. 603; *Woods v. Huntingford*, 3 Ves. 128; *Waring v. Ward*, 7 Ves. 332; *Earl of Oxford v. Lady Rodney*, 14 Ves. 417; *Barham v. Earl of Thanet*, 3 Mylne & K. 607; *Creasy v. Willis*, 159 Mass. 249; 2 Jarman on Wills, 1449.

We are, therefore, of the opinion, 1, that the estate described in the petition descended to the heirs at law of Rowland L. Rose charged with the burden of the mortgage for \$25,000; 2, that he did not by assuming payment of the mortgage nor by guaranteeing payment of the mortgage note charge his administrator with the payment of the mortgage debt; 3, that the administrator will not be justified in paying the mortgage debt out of the personal estate which may come to his hands.

Joseph C. Ely, for petitioners.¹

TURNER v. LAIRD.

SUPREME COURT OF ERRORS, CONNECTICUT. 1896.

[Reported 68 Conn. 198.]

SUIT to determine the construction of the will of Robert Balfour of Norwich, deceased; brought to the Superior Court in New London County and reserved by that court, *Thayer, J.*, upon the facts stated in the complaint, for the consideration and advice of this court.

The parts of the will particularly brought in question were the ninth, tenth and eleventh articles, which were printed in the report of the case of *Turner v. Balfour*, 62 Conn. 89, 90. By the ninth article, "the Geer house" was devised to the testator's grandson Robert Balfour, in fee, subject to a life estate in his widow. By the tenth, half of his residuary estate was left to a son for life, remainder to the same grandson, in fee, and the other half to another son, in fee. By the eleventh,

¹ See *Campbell v. Campbell*, 30 N. J. Eq. 415 (1879); *Creasy v. Willis*, 159 Mass. 249 (1893).

in case Robert Balfour should die, leaving no issue, "his share" was given to the testator's "six children, share and share alike."

All the personal estate was consumed in paying debts, legacies, and charges of settlement. The "Geer house" and a store building forming part of the residuary estate, were each subject to a mortgage made by the testator after the execution of his will, to secure his note to a savings bank for a sum less than half the value of the property so mortgaged. No claim on these notes was ever presented against the estate, and the time limited for the presentation of claims had expired; but one payment of interest on the "Geer house" mortgage was made by the administrator, before the time so limited had expired. Interest on both mortgages had been fully paid by the administrator. Robert Balfour died without issue, during the life of the widow.

The questions presented were whether either or both these mortgages ought to be paid off by the administrator, and if so, out of what funds. The case was reserved for the advice of this court, on the complaint and answers.

When the record was opened, ANDREWS, C. J., inquired if these questions could not have been made when the will was previously before the court for construction. Counsel stated that the facts on which they arose were not then known to the parties; and after consultation the court decided that the case might be heard.

Gardiner Greene, Jr., for Jessie Laird *et al.*

Solomon Lucas, for Rosetta Balfour *et al.*

BALDWIN, J. A specific devise of land, mortgaged by the testator to secure his own debt, *prima facie* imports an intention that such debt shall be satisfied out of the general personal assets. *Hewes v. Dehon*, 3 Gray, 205. In the case at bar, this presumed intention, with respect to the "Geer house," finds additional support in the provision made by the testator in the first article of his will, directing his executor to pay all his just debts and funeral expenses and the legacies subsequently given out of his estate. The word "debts," in such a connection, includes mortgage debts. *Bishop v. Howarth*, 59 Conn. 455, 465.

That the holders of the mortgages in question did not present their claims against the estate, did not, as between the executor and the devisees of the mortgaged property, discharge his obligation to pay them off. The extent of the testator's bounty to his grandson could not be thus reduced by the acts or omissions of third parties. The plaintiff's duty was the same as if the devise of the "Geer house" had been followed by an express direction that any mortgage upon it should be paid by the executor. A payment thus required is made to effectuate a gift from the testator to the devisee. It may be also the satisfaction of a claim legally presented. It may, on the other hand, be made to a creditor who does not wish to receive it, but prefers to let the debt remain on interest, and rely on his collateral security for its ultimate discharge.

The residuary devise and bequest was of what might remain "after the payment of my said debts and funeral expenses, and the preceding legacies and devise." This language charged on the residuary real estate all debts which the personal estate was insufficient to satisfy. Enough of the residuary real estate must therefore be sold to discharge the mortgage on the "Geer house." That on the store building should be satisfied in the same way, unless the residuary devisees otherwise agree.

Section 556 of the General Statutes which provides that when any estate devised shall be taken for payment of debts, a contribution shall be due from the other legatees or devisees, applies only when the will is silent, or its intent uncertain. Here the estate taken is residuary estate, and the testator required the debts to be paid before the residue was formed.

The Superior Court is advised that it is the duty of the plaintiff to pay the mortgage on the "Geer house," and, if requested by any of the residuary devisees, that on the store building; and that the requisite funds should be raised by sale of so much as may be necessary of the residuary real estate.

In this opinion the other judges concurred.

SECTION V.

MARSHALLING.

SAGITARY v. HYDE.

CHANCERY. 1687.

[Reported 1 Vern. 455.¹]

In the principal case there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have a satisfaction of their debts out of the personal assets.²

¹ Only that part of the case which relates to marshalling is given.

² See *Aldrich v. Cooper*, 8 Ves. 332 (1803).

MASTERS v. MASTERS.

CHANCERY. 1718.

[Reported 1 P. Wms. 421.¹]

Mrs. MARY MASTERS by her will left several legacies to several of her relations and others; for instance, to her nieces A. B. and C. pecuniary legacies, (viz.) to A. and B. £200 apiece, and to her niece C. £400, and having a mother living, gave all her household goods, after her mother's death, to be divided among her said three nieces, and also the best of her clothes; she likewise by her will gave several specific legacies, and to the poor of two hospitals in Canterbury (naming them) £5 apiece; as to her lands she devised them to her nephew and heir-at-law, the defendant Sir Harcourt Masters, *but charged the same with the payment of her legacies above-mentioned*, and made the defendant Sir Harcourt executor.

Afterwards her mother died, by which a considerable increase of personal estate came to her, and thereupon she made a codicil, thereby giving several pecuniary legacies to several to whom she had before given legacies by her will, many of which legacies were larger than what were given them by her will.

Her codicil happened not to be attested by any witness, and so as was admitted, could charge no land.

It was also admitted, that both her real and personal estate were deficient in value to pay the legacies and annuities given by her will and codicil.

The defendant Sir Harcourt proved her will and codicil, and upon a bill brought for the payment of several of the legacies to several of the plaintiffs,

First, it was decreed by the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL], that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid.

And therefore, that the legatees in the will should be paid out of the real estate, and if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate; and, there being admitted to be a deficiency, that the land should be forthwith sold to prevent a greater deficiency, but that the specific legacies must be all paid, and not abate in proportion; on the contrary that the charities, though preferred by the civil law, yet they ought to abate in proportion, for they were but legacies.²

¹ Only that part of the case which relates to marshalling is given.

² See *Scales v. Collins*, 9 Hare, 656 (1852).

DEG v. DEG.

CHANCERY. 1727.

[*Reported 2 P. Wms. 412.*¹]

ON an appeal from a decree at the Rolls. A bill was brought by the creditors of Simon Deg the defendant's father (some of which were bond-creditors and some simple contract-creditors) for the payment of their debts out of a personal estate, and out of a trust-estate created by the will of Simon Deg for that purpose.

17 June 1715. Simon Deg makes his will attested by three witnesses, and therein by express words devises his lands in Staffordshire and all his lands in Derby and elsewhere in the county of Derby, and the equity of redemption thereof, and all his personal estate to trustees, (viz.) Lord Macclesfield and ——— Poole Esq.; and to their heirs, executors and administrators, in trust that they should sell all these devised premises, and thereby, together with his personal estate, pay all his debts, and the surplus to be applied as by will, leaving the trustees executors.

Soon after the testator Simon Deg dies, leaving three sons by his second wife, being indebted £8,000 and upwards by marriage articles (which is a debt by specialty) and £570 by simple contract, and £2,331 for rents and profits received by Simon Deg after his first wife's death, from an estate that upon the death of his said first wife did belong to the defendant Simon Deg his eldest son.

And upon this case the several following points arose, and were determined. . . .

Thirdly. The next point (and what was principally appealed from in his Honor's decree) was, that he had decreed, that though the specialty creditors were at liberty to take their preference out of the personal estate, yet in case these should come in upon the lands devised in trust to pay all the debts, they should first bring into hotchpot what they had received out of the personal estate.

Against which it was objected, that the specialty creditors, as to the personal estate of the testator, were to have the preference and to be first paid; and for the residue of their debts remaining unpaid, they ought to come in with the simple-contract creditors upon the trust-estate; that the testator had no power over the personal estate, so as to exempt the same from his debts, or from payment in a course of administration; and therefore, if the devise were of the personal estate to be equally divided betwixt his specialty creditors, and simple-contract creditors, this would be void, and the specialty creditors would have all; so that the devise of the personal estate being void, it was as if it were entirely omitted out of the will, or the devise was only of the real

¹ Only that part of the case which relates to marshalling is given.

estate for the payment of debts; and for the payment of debts must signify the payment of all debts, which would take in those by specialty as well as by simple contract; besides, in this case the fact happened to be, that if the specialty creditors were to bring into hotchpot what they received out of the personal estate, they then would receive little or nothing out of the real estate; and consequently the devise, as to them, for payment of their debts with the other creditors out of the real estate, would be vain.

However, this part of the decree was affirmed by the LORD CHANCELLOR [KING], in regard the testator had connected together his real and personal estate with a view that all should go equally to pay his debts, and he might give his equitable assets in what manner and upon what terms he pleased: for instance, he might dispose of them in trust to pay his simple-contract debts only, though it was true he had no power by his will to dispose of his personal estate from his creditors, or to devise it for satisfaction of his simple-contract creditors, in preference to his specialty creditors; but these equitable assets being entirely within his power, he might let in the specialty creditors for a satisfaction thereout, under what terms he should think proper; and it was a very ill argument to say, that the specialty creditors had received so much out of the personal estate, as to make it not worth their while to bring it into hotchpot; for the more they had received of the personal estate, the less need they had of the aid of a court of equity to be paid out of the trust estate.

MOGG v. HODGES.

CHANCERY. 1750.

[*Reported 2 Ves. Sr. 52.*¹]

JANE CHURCHILL by will leaves her real estate to trustees to be sold; the profits to be applied to the uses of the will: directs, that her debts and legacies should be paid out of the personal estate; makes the trustees executors; and leaves them all the residue of her personal estate and of that money, that should be raised by sale of her real, to be given by them in what charities they should think proper, particularly recommending to them the hospital at Bath.

The trustees agreed, that as all money arising from a real estate is to be accounted as real, the bequest was so far void by Statute of Mortmain, 9 G. 2, c. 36, but desired, that in compliance with the intent of testatrix the assets should be so marshalled, that all the other legacies should be paid out of the real estate, and so the personal go to the charity, which legacy might, according to *Dalton v. James*, AmbL. 20: and the common course of the court, where there are bond and other creditors, is to direct the bond-creditors to be paid out of the real estate, that the personal might be left to others.

¹ Only that part of the case which relates to marshalling is given.

LORD CHANCELLOR [HARDWICKE] thought himself not warranted to set up a rule of equity, contrary to the common rules of the court, merely to support a bequest which was contrary to law. It would be contrary to the express direction of the testatrix, who desires first, that her legacies and debts should be paid out of the personal; that is, the natural fund; and if the heir or devisee of the real estate is sued by a bond-creditor, he may stand in the place of that creditor to be reimbursed out of the personal. In *Dalton v. James*, the legacies were particularly chargeable on both estates; and the court will always for the furtherance of justice, as in the case of debts, or, to comply as far as is consistent with law with the intention of testator, in the case of legacies, when there are two different funds for payment of debts and legacies, order each particular to be paid out of that fund it legally may. But the assets cannot be so marshalled to support a legacy contrary to law.

SECTION VI.

TIME OF PAYMENT OF LEGACIES.

NEWMAN v. BATESON.

CHANCERY. 1786.

[*Reported 3 Swanst.* 689.]

A SUM of £20,000 was given by the testator Newman to his natural daughter, with directions that so much of the interest should be applied in her maintenance as his executors should think proper.

THE MASTER OF THE ROLLS [SIR LLOYD KENYON], for the Lord Chancellor, said, that although the daughter was a natural child, yet the testator, having given maintenance expressly to her, it came within the common rule of a legacy given to a child, and directed interest from the time of the testator's death. From Mr. Cox's notes. — Lord Colchester's MSS.

PEARSON v. PEARSON.

CHANCERY IN IRELAND. 1802.

[*Reported 1 Sch. & L.* 10.]

THE bill was filed by the executor of Matthew Pearson, to have the trusts of his will carried into execution under the direction of the court.

By this will several pecuniary legacies were bequeathed with directions that they should be paid within a week after the death of the

testator, or in failure thereof that they should bear interest from that time. There followed other legacies to Mrs. Vickers, and to ——— Vickers her son, which were given generally without assigning any time for payment, and the residuum was bequeathed, one half to be divided by the executor between the sons and daughters, grandsons and granddaughters of testator's cousins Roger and Henry Pearson, share and share alike; and the other moiety to his said executor for his own use, subject to make good the other demands created by the will.

The testator died possessed of a considerable personal estate, consisting chiefly of bank stock and Government debentures. One question which arose upon the will was, whether the legacies to Mrs. Vickers and her son bore interest, the personal estate being a productive fund.

Mr. Burne and *Mr. F. W. Greene*, for these legatees, cited *Maxwell v. Wettenhall*, 2 P. Wms. 27 (4th point). "If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly, it seems in this case the legacy shall carry interest from the death of the testator."

Mr. Huband and *Mr. Scriven*, on the other side, mentioned the case of *Snell v. Dee*, 2 Salk. 415. "If a legacy be devised generally, and no time ascertained for the payment, a year shall be allowed, for so long the Statute of Distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts. But where a certain legacy is left payable at a day certain, it must be paid with interest from that day." And in *Bilson v. Saunders*, Select Cases in Chanc. 72; 2 Eq. Abr. 566, a legacy was left to an infant; the testator had a great deal of money in bank stock, the executor was residuary legatee, and on a bill for the legacy, the question was whether it shall bear interest, and from what time, and the Court of Exchequer agreed that it should only bear interest from a year after the testator's death, for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest.

LORD CHANCELLOR [REDESDALE]. As to the reason given for the rule mentioned in *Maxwell v. Wettenhall*, that the legacy is payable out of a fund which is yielding profits, I take it that makes no difference. In case of a legacy charged upon lands, the land yields profit: but that is not the reason that in such case the legacy bears interest immediately. The rule with respect to legacies out of personal estate is taken from the practice in the ecclesiastical courts where a year is given to the executor to collect the effects, and he cannot be called upon to pay before that time, because he cannot know until then what fund there is to pay; in conformity to this, courts of equity have proceeded, in the case of legacies out of personal estates. But in the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator or not at all.

Nothing can be more settled than that a man's saying, "I direct all my stock to be applied to the payment of legacies," will not make those

legacies bear interest one moment sooner than they otherwise would: whether the fund bears interest or not is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening v. Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after testator's death, and the court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months all the intermediate profits belonged to the residuary legatee. The executor may pay the legacy within the twelve months,¹ but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets he is to pay interest from the end of the twelve months, whether the assets have been productive or not.²

LOWNDES v. LOWNDES.

EXCHEQUER. IN EQUITY. 1808.

[Reported 15 Ves. 301.]

WILLIAM LOWNDES by his will, dated the 3d May, 1805, gave and bequeathed to trustees the sum of £20,000 sterling; upon trust to lay it out with consent of his wife and daughter at interest in Government or real securities, and from time to time during the life of Elizabeth his wife, and when and as and after the interest, dividends, or annual produce, of the said trust moneys should become due and payable, to pay to the said Elizabeth his wife; and from and after the death of Elizabeth his wife, in trust from time to time, after the same interest, dividends, and annual produce, should become due, to pay to his daughter for life; with a power of appointment to his daughter. After disposing of the £20,000 in several events which never occurred, the will proceeded thus:—

“I give and bequeath to my said daughter Elizabeth Lowndes and

¹ “I know of no case which prevents executors, if they choose, from paying legacies, or handing over the residue within the year, and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing.” — *Per* LORD ELDON, C., in *Angerslein v. Martin*, T. & R. 232, 241 (1823). So held, in *Sullivan v. Winthrop*, 1 Sumn. 1 (1829).

² A part of the case relating to the payment of costs is omitted.

“The direction to pay as soon as possible does not enable me to say, the executors ought to have paid upon the very day after the testator's death; nor that there was any precise day, upon which they ought to have paid it.” — *Per* SIR WILLIAM GRANT, M. R., in *Webster v. Hale*, 8 Ves. 410, 415 (1803). See also *Benson v. Maude*, 6 Mad. 15 (1821).

to Thomas Lowndes, their executors, &c., the sum of £3,000 sterling upon trust that they the said Elizabeth Lowndes and Thomas Lowndes and the survivor shall lay out and invest the same at interest in Government or real security and shall from time to time during the natural life of William Hook and when or after the dividends, interest, or yearly income of the said last-mentioned moneys should become due and payable, pay the same dividends, interest, and income into the proper hands of the said William Hook for his support and maintenance, so and in such manner that he may not effectually anticipate, assign, charge, or encumber the growing payments thereof."

After the death of William Hook the testator bequeathed the stock upon other trusts, subject to a power of appointment to William Hook amongst his children. The testator also bequeathed in the same terms two other sums of £3,000 each to two other children of the name of Hook. The three legatees of that name were his natural children, and were infants at the time of his death. He also gave some small annuities: the first payment to begin and be made at the end of three calendar months next after his decease.

The testator died on the 5th of December, 1806; leaving his wife Elizabeth Lowndes and his daughter Elizabeth Lowndes surviving.

Elizabeth Lowndes, the widow, died in February, 1807, intestate; and Elizabeth Lowndes, the daughter, was her administratrix.

It did not appear in the cause that Elizabeth Lowndes the widow had any other provision than that arising from the £20,000, bequeathed to her by the will; and the infants, the Hooks, were wholly unprovided for except by the will.

The only questions discussed were, whether the widow was entitled to interest upon the £20,000 from the death of the testator; and whether the Hooks, the infant natural children of the testator, were also entitled to interest from the death upon their legacies.

The widow lived only two months after the testator: but it was insisted, that, if interest on the £20,000 began to run from the death of the testator in favor of the widow, it would continue in favor of the daughter, the next taker for life, notwithstanding she had other provisions under the will.

The cases cited were *Beckford v. Tobin*, 1 Ves. 308; *Cricket v. Dolby*, 3 Ves. 10; *Gibson v. Bott*, 7 Ves. 89, and *Spurway v. Glyn*, 9 Ves. 483.

At the hearing the court inclined against giving interest from the death of the testator in either case; and *Baron Thompson* observed, that in the latter part of the will the testator gives some annuities, and directs, that the payment shall begin at the end of three months from the death; and observed further, that, to support the claim of interest upon the £20,000, it must be argued, that the daughter Elizabeth Lowndes, who was adult, would be immediately entitled to interest from the death of the testator, if Elizabeth Lowndes, the mother, had died in the testator's life.

THE LORD CHIEF BARON delivered the opinion of the court.

We have taken this case into consideration not so much from any difficulty we entertained upon it, as out of respect to the opinion of Lord Alvanley in *Cricket v. Dolby*, 3 Ves. 12, 16; see the notes. The point, raised as to the £20,000, is, whether interest is to be given to the wife immediately from the death of the testator. In respect to a child, it is clear, interest should be given from the death of the testator: not so much from the near connection with him as from the imbecility of the child. The law cannot make nice distinctions as to the ages of infants; and considers all under twenty-one as equally incapable of providing for themselves. Very different is the case of the wife. Lord Alvanley threw out an opinion in favor of the wife; but in the very same sentence said, he knew of no case so decided. In the absence of any authority to support us in giving interest to the wife from the death of the testator our opinion is, that we are not authorized to decree it.

With respect to the natural children, it is clear, that by law they are strangers to the testator. In *Beckford v. Tobin* Lord Hardwicke conceived, that the testator, by directing maintenance out of the interest, intended that interest should be given from the death. But in this case there is no scintilla of intention to be collected from the will; as there was there from the codicil.

It is plain, that the particular words, used in this bequest, were to mark his intention, that the fund should not be alienated.

Upon the whole, therefore, we are of opinion, that neither the widow nor the daughter are entitled to interest on the £20,000 from the testator's death; and also, that the natural children are not entitled to interest from his death.¹

RAVEN v. WAITE.

CHANCERY. 1818.

[Reported 1 Swanst. 553.]

FRANCES RAVEN having, in 1809, exhibited articles of the peace against her husband John Raven, he executed a deed of separation, by which some property of the wife, producing a small annual income, was conveyed in trust for her separate use, she agreeing to take upon herself the maintenance and education of her six infant children by her husband. From the date of the deed, the husband and wife had continued to live apart, the husband neither contributing, nor being in

¹ In *Stent v. Robinson*, 12 Ves. 461 (1806), and *Acquackanonk Church v. Ackerman*, Saxt. 40 (N. J. 1830), it was held, in accordance with the principal case, that a legacy to the testator's widow did not carry interest from his death. In the latter case the legacy was in lieu of dower. *Pollard v. Pollard*, 1 Allen, 490 (Mass. 1861), is *contra*.

circumstances to contribute towards the maintenance of his wife and children. The wife being unable to provide for their support, Josiah North, the husband's uncle, assisted her by the advance of several sums; and about the 1st of November, 1809, fixed his voluntary allowance to her at £60 a year, which he paid quarterly till his death, on the 5th of November, 1815.

By his will, dated the 2d of April, 1810, Josiah North bequeathed to each of the children of his nephew John Raven, who should be living at the testator's decease, £300, to be paid as they respectively attained the age of twenty-one years; directing, that in case any of them should die under that age, unmarried and without issue, their shares should sink into the residuum of his personal estate; the testator then bequeathed to John Waite, John Day, and Robert Day (his executors and devisees in trust), £1,600 upon trust, to place the same at interest on Government or real security, and to pay and apply the interest and proceeds, from time to time, as the same should become due, for the maintenance and support of Frances Raven, and the maintenance, education, and bringing up of all and every her children, until the youngest of them should attain his or her age of twenty-one years; and from that event, to pay the interest of the said sum of £1,600 to Frances Raven, during such part of her life as she should remain the wife of the said John Raven, for her own sole and separate use, and he directed that her husband should not intermeddle therewith, neither should the same be subject to his debts, control, or engagements, and that her receipt should be a sufficient discharge to his trustees; and in case of the death of John Raven, he directed his trustees to pay the interest to Frances Raven during such part of her life as she should continue his widow, but in case she should die during the life of her husband, or in case of his death before her, should intermarry with any other person, then he directed that his trustees, and the survivor of them, his executors, &c., should take the said children under their sole care and management (as it was his express will that John Raven should not receive any benefit arising from the sum of £1,600), and apply the interest thereof towards the maintenance, education, and bringing up of all and every the said children, until the youngest of them should attain the age of twenty-one years; and when the youngest should have attained that age, he directed that the said principal sum of £1,600, and the interest then due thereon (in case Frances Raven should be then dead or married again), should sink into the residuum of his personal estate for the benefit of the persons entitled thereto. The testator also bequeathed to John Raven an annuity of £20 for his life, and to other persons various annuities, with directions for their commencement from the first quarter-day ensuing his death.

The bill filed in behalf of Frances Raven (by her next friend) against the executors of North, prayed a declaration that she was entitled to the interest on the sum of £1,600 from the testator's death, and payment accordingly.

Mr. Bell and Mr. Barber, for the plaintiff.

Mr. Fonblanque and Mr. Blenman, for the defendants.

THE MASTER OF THE ROLLS. [SIR THOMAS PLUMER.] My present impression is, that the plaintiff cannot sustain her claim, either on the language of the will, on principle, or on authority.

The plaintiff, to whom the legacy was primarily given, is adult, a wife separated from her husband, with separate maintenance, the amount of which does not appear, given to her on condition of maintaining her children: her situation in life is not in evidence, whether she is in circumstances to provide for herself; but it appears, that in addition to her separate maintenance, the testator allowed to her an annuity of £60. The question is, whether he intended that interest should commence on this legacy from his death? The undisputed general rule, that a legacy carries interest only from the expiration of a year after the death of the testator, is founded on this reason, that interest is given for non-payment of the legacy when due; and that a legacy for the payment of which no other period is assigned by the will, is not due till the end of the year: but that general rule has exceptions; and however reluctant the court may be to admit them, as productive of litigation, and the difficulty of knowing where to stop, established and authorized exceptions must prevail. The first exception is a specific legacy, an immediate gift of the fund with all its produce. *Barrington v. Tristram*, 6 Ves. 345.¹ This legacy is clearly not specific. Another exception, which raises the present question, is, a legacy for the maintenance of the infant children of the testator. The foundations of that exception are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal. The court, therefore, concludes that the parent has postponed payment of the principal, in respect only of this inability to give a discharge, and infers an intention that interest shall be paid immediately.

It is unnecessary here to inquire whether the exception has not been extended in favor of children without any very solid ground; but can any authority be found which carries the exception further? All the cases decided are cases of infants. In *Cricket v. Dolby*, 3 Ves. 16, the reasoning of Lord Alvanley is expressly confined to infants; in *Beckford v. Tobin*, 1 Ves. 308, Lord Hardwicke extended the exception to the case of an illegitimate child, founding his decree on the infancy of the legatee; and in *Hill v. Hill*, 3 Ves. & Bea. 183, Sir William Grant recognized the authority of *Beckford v. Tobin*, upon the point of infancy, and adopted the same principle. In *Lowndes v. Lowndes*, 15 Ves. 301, the Court of Exchequer decided, that in the case of illegitimate children infancy will not authorize an exception to the general rule. I own, I do not see the distinction between that case, so far as the Hooks were concerned, and *Beckford v. Tobin*;

¹ See *Bristow v. Bristow*, 5 Beav. 289 (1842); *Sargent v. Sargent*, 103 Mass. 297 (1869).

the declared and principal purpose of the testator was not, as by what I cannot but think a forced construction, the court held, to prevent alienation, but to provide maintenance. There, however, under the circumstances, the court refused to extend the exception to a legacy in favor of an infant; but no case has been produced in which it ever was extended to a legacy in favor of an adult, though cases innumerable must have occurred of legacies to persons aged and decrepid, objects of the testator's bounty during his life.

On what principle could such an exception in favor of adults be founded? On necessity? But it is said, that the circumstances of the legatee are immaterial. On the terms "maintenance and support"? What charm is there in those words? In what instance of an adult legatee have they been held to confer a right to immediate interest? Neither reason nor authority extends the exception to adults. The only instance in which such a doctrine has been countenanced, is the *dictum* of Lord Alvanley in *Cricket v. Dolby*, that "a wife would come under the same exception as a child;" but he immediately reduces the authority of that *dictum*, by acknowledging that all his learning and experience had discovered no such case; and suggesting, that it could hardly ever happen that a wife has not some other provision. Lord Alvanley adds, "and that may make a difference in the case of a child;" intimating, that the claim of a wife partially provided for might be distinguished from the claim of a child.

Opposed to the *dictum* of Lord Alvanley thus qualified, is the direct decision on the point by the Court of Exchequer in *Lovndes v. Lovndes*,—a decision which was unanimous, and pronounced after having been suspended from a deference to the *dictum* of Lord Alvanley, and for the purpose of maturely considering it. The extension of the exception to an adult is therefore negatived by the latest, or rather the only, decision on the subject. The present is the case of an adult, and an adult partially provided for: the husband of the plaintiff has actually made a provision for her and her children. For anything that appears to the court, she may be in affluent circumstances.

No expression in the will indicates the intention for which the plaintiff contends. The disposition in favor of the annuitants shows that the testator knew how to direct an immediate provision when such was his meaning. Had he entertained that intention in favor of the plaintiff, would he not have declared it, and inserted a direction for the payment of interest from his death?

It is then insisted, that this is a provision for the joint benefit of an adult parent and her infant children; and that the exception in favor of the infants must prevail. But the gift here is to the mother, to enable her to maintain herself and her children, and the legacy is payable to her during her life; after her death, indeed, the trustees are to apply it for the maintenance of the children, but the mother is the primary

object of the testator's bounty. Such a gift cannot form an exception to the rule.

The only remaining argument is, that if the plaintiff had died in the life of the testator, the children would have been the immediate objects of this bequest. But supposing that the legacy had been given to an affluent individual for life, with remainder to the children, the general rule evidently could not be affected by the death of that individual in the life of the testator. The will must be construed as it stands, not as affected by events; the rule cannot change with subsequent accidents, because it depends on the intent of the testator, — that is, the intent with which the will was written, and according to the state of circumstances at that time.

Neither the principle of the rule, and of the exceptions, therefore, nor the terms of the will, support the plaintiff's claim. I cannot carry the exception beyond the authorities, and introduce a new case in which the rule is to be relaxed.

*Bill dismissed; costs to be paid from the residuary estate.*¹

HOUGHTON v. FRANKLIN.

CHANCERY. 1823.

[Reported 1 S. & St. 390.]

ADMIRAL GRAVES made two codicils to his will. In the second codicil was contained the following bequest: —

“I give and bequeath unto Rebecca Houghton and her mother, the sum of £160 per annum, clear of all expenses; they are to be paid £13 6s. 8d. monthly. In case her mother should die first, the same to be continued to the daughter; provided that she remains single.” The testator bequeathed the residue of his personal estate to the defendants, Maria Franklin and Elizabeth Edwards.

The bill was filed by Rebecca Houghton and her mother, for the usual accounts of the testator's personal estate; and to have a sufficient part of the residue appropriated for securing the annuity of £160.

In the course of the cause a question was made as to the time from which the annuity was to commence; and that question now came on to be argued.

Mr. Pemberton for the defendants.

Mr. Heald and *Mr. Swanston*, for the plaintiffs.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] As a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some

¹ See *Sullivan v. Winthrop*, 1 Sumn. 1 (U. S. C. C. 1829).

circumstances or expression in the will to control that intention. In this will there is no such circumstance or expression; and I am, therefore, of opinion, that the payment of this annuity ought to commence from the testator's death.¹

WELSH v. BROWN.

SUPREME COURT OF NEW JERSEY. 1881.

[*Reported 43 N. J. 37.*]

ON writ of error to Morris Circuit.

Catherine Welsh died on the 22d of April, 1874. By her will, dated April 20th, in the same year, she made to the plaintiff the following bequest:—

“I do give and bequeath to my niece, Aletta Brown, my gold watch, my melodeon, my black earrings, my black furs, one set silver tea-spoons (second choice), my cashmere shawl, my brown silk dress, and the interest of twenty-five hundred dollars, to be paid to her annually by my executor; and at her death the said sum of twenty-five hundred dollars shall be paid to or divided equally among any child or children of hers that may then be living, or their heirs; but if the said Aletta Brown shall die leaving no children or grandchildren living, then I do order the said sum of twenty-five hundred dollars divided equally among my heirs. I also give her all my mourning clothing.”

She also gave sundry pecuniary legacies and specific legacies of personal property to different legatees, after which the will contained the following provisions:—

“I do order that none of the legacies or interest herein given or bequeathed shall be due or payable during the lifetime of my mother, but that all interest that may accrue or become due on any obligations belonging to my estate shall be used for the comfort and support of my mother; and if said interest is not sufficient, then I do order my executor to pay out of my estate such sum as may become necessary for the support of my said mother and for her burial.”

She further orders and directs as follows: “I do order and direct that all taxes that may be levied or assessed on any money or interest herein bequeathed or given away shall first be deducted from the said money, and the balance paid, and said money or interest shall be subject to the taxes as long as it remains in the hands or control of my executor. . . . I do order and direct that, after putting at interest a

¹ “If an annuity is given, the first payment is paid at the end of the year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest. I remember, when it was not clear in the case of the annuity; though it is so now certainly.”—*Per LORD ELDON, C.*, in *Gibson v. Bott*, 7 Ves. 39, 96 (1802).

sum sufficient to pay the interest, and paying the legacies herein bequeathed, and after settling my estate, if any balance shall be found due my estate or in the hands of my executor, he shall then divide such sum, share and share alike, among my heirs."

This action was brought by Miss Brown, the legatee, against the executor of the deceased, to recover \$175, one year's interest on the said sum of \$2,500, accruing between the 22d of April, 1874, and the 22d of April, 1875. The defendant demurred to the declaration, and the question designed to be raised by the demurrer was, whether, under the bequest to the plaintiff, she was entitled to interest on the said sum of \$2,500 from the death of the testatrix, or from the expiration of one year from that event.

This question the court below decided in favor of the plaintiff below. Hence this writ of error.

Argued at November Term, 1880, before BEASLEY, Chief Justice, and Justices DEPUE, SCUDDER, and KNAPP.

For the plaintiff in error, *Alfred Mills*.

Contra, *S. B. Ransom*.

The opinion of the court was delivered by

DEPUE, J. In determining as of what time legacies shall take effect and be payable, certain general rules have been adopted; and testators, in making their wills, are considered as framing their testamentary dispositions in view of those general rules.

Specific legacies are treated as severed from the bulk of the testator's property by the operation of the will, and their increase and emolument are regarded as specifically appropriated for the benefit of the legatee from that period; though the time for the enjoyment of the principal may be postponed to a future period. With respect to general legacies, the law, for convenience, has prescribed, as a general rule, that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and satisfied out of the testator's estate at the expiration of one year next after his death. 2 Roper on Leg. 1245; 2 Lead. Cas. in Eq. 639, notes to *Ashburner v. MacGuire*. On a legacy coming within the class of general legacies, if the legacy be not paid at the expiration of the year, interest from that time will be allowed as damages; and interest on a legacy will not be computed from a period prior to that time, unless there be a clear expression of intention that interest shall be reckoned from an antecedent time or event. In that case the interest is regarded as of the substance of the gift, and is not recoverable, as such, unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.

To this general rule there are a few well-established exceptions. A legacy given in satisfaction of a debt will carry interest from the testator's death. *Clark v. Sewell*, 3 Atk. 99. Interest on a legacy to a minor child of the testator, or to one to whom the testator is *in loco parentis*, will be allowed from the testator's death as a provision for

maintenance, where no provision is made by will or otherwise for the support of such legatee. *Brinkerhoff v. Merselis*, 4 Zab. 680; *Cox v. Corkendall*, 2 Beas. 138; *Hennion's Ex'rs v. Jacobus*, 12 C. E. Green, 28; *Ex'r of Kearney v. Kearney*, 2 C. E. Green, 59, 63, 504. Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event. In this respect an annuity differs from a general legacy; for a general legacy, not being payable out of the testator's assets before the end of the year from the testator's death, no interest will be due thereon until the expiration of the second year. 2 Rep. on Leg. 1245.

There is another class of cases which are apparently exceptions to this general rule; but those cases stand upon peculiar and special grounds, and are regarded as a class by themselves. On a bequest of the residue of the testator's estate, or of some aliquot part or proportion thereof, in trust to pay the interest or income to a legatee for life, with a gift of the principal over at his death, the interest or income payable to the life tenant will be computed from the testator's death. *Green v. Green*, 3 Stew. 451; s. c. 5 Stew. 768; *Van Blarcom v. Dager*, 4 Stew. 783; 2 Spence's Eq. Jur. 552-569; *Howe v. Earl of Dartmouth*, 7 Ves. 137, and the notes to that case in 2 Lead. Cas. in Eq. 686 *et seq.* Cases of this class are distinguished from legacies of a definite sum with remainder over, with respect to the computation of interest to the life tenant. 2 Wms. on Ex'rs, 1391; *Fearn v. Young*, 9 Ves. 549, *per* Lord Eldon; *Baker v. Baker*, 6 H. of L. Cas. 623, *per* Lord Chelmsford; *Van Blarcom v. Dager*, 4 Stew. 783, *per* Dodd, J. In the case last cited, the computation from the testator's death of interest or income to the life tenant, where the gift is of the residue, is placed on a special equity as between the parties who are to participate in the gift, arising from the injustice that would be done to the life tenant by the addition of the entire interest to the capital. 2 Rep. on Leg. 1320. That the computation of interest as between the life-tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate, is founded exclusively on the special equity between the parties among whom the gift is to be apportioned, is apparent from an examination of the cases. For the first year, sometimes, the interest on the whole income is allowed the life tenant; sometimes only a portion of the income for the first year is allotted to the life tenant, and the balance is added to increase the capital, for the reason that, in such cases, the circumstances are such that it would be inequitable to the remainder-man to give the whole produce of the first year to the life tenant; and sometimes the allowance to the life tenant for the first year is upon a *percentage* determined by the court, on a consideration of what would be just and equitable as between the parties, under the circumstances of the particular case. *Hewitt v. Morris*, 1 Turn. & Russ. 241; *Fearn v. Young*, 9 Ves. 552; *Brown v. Gellatly*, L. R. 2 Ch. App. 751; 2 Spence's Eq. Jur. 558, *et seq.*

The apparent conflict in the decisions on this subject is in a large measure due to the failure to observe the special grounds on which the computation of interest is made as between the life tenant and remainder-man, where the *corpus* of the gift is the residue of the testator's estate. Some of it is also attributable to expressions used in that class of cases where interest is allowed by way of maintenance for minor children, or those to whom the testator is *in loco parentis*. If those cases which are universally considered as exceptional, and as resting on special and peculiar grounds, are put aside, the decisions on the subject of interest on legacies are quite consistent and harmonious.

The contention upon which the judgment below is sought to be sustained is, that the gift to Miss Brown is of an annuity, and that the intention of the testatrix to pay her interest from her death is to be deduced from the language of the bequest.

An annuity is defined to be a yearly payment of a certain sum of money. 2 Wms. on Ex'rs, 809; *Booth v. Ammerman*, 4 Bradf. Sur. R. 129. The first payment of an annuity given by will is due at the end of one year from the testator's death. This is one of the exceptions to the general rule with respect to the enjoyment by a life tenant of the benefits given by will. Where a general legacy is given to one for life, with remainder over to another, no interest will be due until the expiration of the second year. 2 Rop. on Leg. 1253. This distinction between an annuity and a legacy for life with remainder over, was taken by Lord Eldon in *Gibson v. Bott*, 7 Ves. 89, 96. His language is: "If an annuity is given, the first payment is paid at the end of one year from the death; but if the legacy is given for life, with remainder over, no interest is due till the end of two years; it is only interest on the legacy, and until the legacy is payable there is no fund to produce interest." Mr. Roper approves of this distinction as founded on principle, and, speaking of the disposition of a sum of money and the interest of it given as an annuity to one for life, says that the annuity, being given in the form of interest upon a gross sum of money to be taken out of the assets as any other legacy, cannot be payable sooner than the fund produces the means for that purpose. 2 Rop. on Leg. 877.

In the present case the gift to the plaintiff is of the interest on a gross sum — \$2,500 — to be paid to her annually by the executor; and after the plaintiff's death the principal sum is payable to other parties. The will provides that the executor, after putting out at interest a sum sufficient to pay the interest and legacies bequeathed, shall divide the residue among the heirs of the testatrix. It further directs that all taxes on the money or interest bequeathed should first be deducted, and the balance only paid, and that the said money or interest should be subject to the taxes as long as it remained in the hands or under the control of the executor.

In substance the bequest is to the executor to invest and pay over the net income or interest, after deducting taxes, to the life tenant

during her life, and after her death, to pay the entire principal to the legatees in remainder. The executor, in the administration of the estate as executor, was under no obligation to set apart the principal sum on which interest was allowed until the end of the first year; and until that separation was made, there was no fund to produce interest for the life tenant. In legal effect the bequest is analogous to those in *Lowndes v. Lowndes*, 15 Ves. 301, and *Raven v. Waite*, 1 Swanst. 553, upon which interest was allowed only from the expiration of the year. In my examination of the English cases, I have not found a single decision in which a bequest similar to that under consideration, has been considered as excluded from the general rule that the legacy shall, for such purposes, take effect after the lapse of the year. The distinction between an annuity pure and simple, which is to be paid at all events out of the testator's estate at the expense of the residuary legatee, and the interest or income for life, of a certain sum set apart by the testator for that purpose, and given over in gross to another after the death of the life tenant, has been quite uniformly adhered to. *Baker v. Baker*, supra, was decided upon that distinction. Lord Cranworth, in delivering his opinion, said: "In all these cases arising upon the construction of wills, the real question is, whether that which is given is given as an annuity, or is given as the interest of a fund; and where that question is to be considered, what you must look to is this: whether the language of the testator imports that a sum, at all events, is annually to be paid out of his general estate, or only the interest, or a portion of the interest, of a capital sum which is to be set apart." This distinction is recognized by Lord Justice Rolt in *Birch v. Shewall*, L. R. 2 Ch. App. 649. The principle on which it rests is that a bequest of a specific sum of money is one gift, one legacy, the benefit of which the testator has apportioned between the donee for life and the remainder-man. To the life tenant he has given the interest or produce of the fund during life, and the capital sum to the remainder-man after the death of the former. Such a legacy is, therefore, subject to the rule that general legacies are to take effect and be payable at the expiration of a year from the testator's death. The executor is not bound to set apart the legacy for investment before the end of the year; and until that be done there is no fund to produce the interest that is payable to the life tenant. In *Knight v. Knight*, 2 Sim. & Stu. 490, the bequest was to each of the children of T. W., "as soon as they attain the age of twenty-one years, the sum of £2,000, with interest at the rate of five per cent per annum;" and interest was held to be computable only from the end of the year, for the reason that the executors would not be bound to make an investment for the security of the legatees until the end of the year.

In the courts of this country the weight of authority is in the same direction.

Judge Redfield adopts the same distinction between annuities and accruing interest when made the subject of bequests, with respect to

the time when the bequest becomes operative, as was taken by Lord Eldon in *Gibson v. Bott*. He holds that, in case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but that, when the interest or net income of a certain sum is given, the interest will not begin to run until one year from the decease of the testator, and the first payment will, consequently, become due in two years from that date. 3 Redfield on Wills, 184, c. V., § 25, page 13. In *Lawrence v. Embree*, 3 Bradf. Sur. R. 364, a bequest of interest or other income of a certain sum to be invested by executors was held not to begin to carry interest until the end of one year, at which time the investment should be made; and the distinction between an annuity and a bequest of the interest of a specific sum was made the basis of the decision. In the subsequent case of *Booth v. Ammerman*, 4 Bradf. Sur. R. 129, the subject received a careful consideration. The bequest under adjudication was to the testator's sister, "of the interest upon fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually," and the executors were authorized to invest the estate in such sums and upon such terms as they might deem necessary for "the due execution of the will." The testator died in October, 1854, and the legatee became a widow in May, 1855. The question was when the legacy became due, and from what time it bore interest. In delivering his opinion the learned surrogate adopted the distinction laid down by Lord Eldon in *Gibson v. Bott*, as a distinction in favor of annuities long recognized in the books. In commenting on the words "the interest," and "payable annually," in answer to the inquiry he propounds, whether it is an annuity or merely an ordinary legacy, he said: "It is not a stated sum, but may be more or less, according to the earnings of the capital; in this respect it does not possess the characteristic of an annuity, but is merely interest or income. It is payable annually; in this respect it possesses a characteristic common alike to an annuity and to interest, but not peculiar to either. In the present case the testator gives 'the interest upon fifteen hundred dollars;' the gift is of interest, and that is the entire substance of the gift. The mode of payment is 'annually,' and that relates to the payment, and not to the gift. The thing given is the profits of a certain portion of the estate, to be separated in money and invested. It is given as interest of a demonstrated capital, and interest cannot, therefore, begin to accrue until the capital becomes due. The provision of the will would, therefore, seem to be satisfied by making the investment at the end of the year, and paying the interest annually to the life tenant. The will expressly provides for this investment, and, on the decease of the legatee, to whom the interest is bequeathed for life, gives the *corpus*, or capital, over. This bequest is substantially a legacy for life with remainder over; and the legacy would not become due so as to draw interest till the end of the year, unless otherwise specially directed. I do not think the direction to pay interest annually sufficient

to take the case out of the general rule." These remarks have been quoted for the reason that they are applicable to the bequest under consideration, and, in my judgment, are a correct exposition of the law on the subject. In that case the direction was that the bequest should take effect in case the legatee "should become a widow." She became a widow within the year. The surrogate regarded that language as prescribing a condition or contingency on the happening of which the legacy became due, and gave interest from the happening of her widowhood, and denied that the words "payable annually" amounted to such a special direction as would carry interest from the testator's death.

In *Cogswell v. Cogswell*, 2 Edw. Ch. 230, under a direction that executors should invest in stock a sum of money which would produce an annual income of \$1,000, and to permit testator's wife to take such income from time to time as the same should become payable, the executors were allowed one year to make the investment.

An examination of the cases which are usually cited as holding a different principle will disclose the fact that, with a few exceptions, they are cases coming within some one of the exceptions above stated to the general rule.

In *Williamson v. Williamson*, 6 Paige, 298, the bequest was of the interest or income of the residuary estate to the legatee for life. In *Craig v. Craig*, 3 Barb. Ch. 76, one of the bequests was in the form of a direction for the investment of such a sum as would produce in legal interest \$500 per annum, as a provision for the testator's lunatic son, which should give him "a sure and ample support during his life;" the other was of an annuity of \$1,000 per year to the testator's wife, the principal to be invested as she might reasonably require. In *Cook v. Meeker*, 36 N. Y. 15, the legatees for life were the wife, daughter, and grandchildren of the testator, and their legacies were considered as intended to provide a fund for their support and maintenance. In *re Devlin's Estate*, 1 Tucker, 460, the legatees were children without any other means of support, and the case was expressly decided upon the distinction between interest upon a sum of money left as a legacy, and an annuity or income bequeathed for the support of the legatee. In *Sweet v. Boston*, 18 Pick. 123, the gift to the legatee was of the interest of \$50,000 from the time of the testator's decease during the life of the legatee. In *Brimblecom v. Haven*, 12 Cush. 511, the bequest was "of the interest of \$6,000," without any gift over of the principal sum: and the court held that, there being no setting apart of any fund to answer the legacy, it was, in effect, the gift of an annuity of a fixed sum of money annually, fixed and expressed by the term "interest of \$6,000." The two cases cited from the courts of Pennsylvania (*Eyre v. Golden*, 5 Binn. 472, and *In re Hilliard's Estate*, 5 Watts & Serg. 30) may be considered as direct authorities in favor of the view adopted by the court below. But these cases, if they do not stand alone, are contrary to the great weight of authority, and are against correct principles.

The decisions in the courts of this State on this subject have adopted and followed the law as laid down by Lord Eldon and by Mr. Roper.

In *Halsted v. Meeker, Ex'r*, 3 C. E. Green, 136, upon a direction in the testator's will that executors should place the sum of \$20,000 at interest, and pay the net income or interest thereof, semi-annually to the testator's daughter, Chancellor Zabriskie held that the executors were required to invest at the end of the year, and that the legatee was entitled to the interest which should accrue from that time. In *Henion's Ex'rs v. Jacobus*, 12 C. E. Green, 28, the bequest was to the testator's daughter, of the legal interest of \$1,400, to be paid to her annually, and the principal at her death to be divided among her heirs; Chancellor Runyon held that the interest payable to the testator's daughter was to be computed from the end of one year from the testator's death. The same rule was re-affirmed and applied in *Howard v. Francis*, 3 Stew. 444. These cases from the Court of Chancery were cited with apparent approval in *Van Blarcom v. Duger*, 4 Stew. 495. They are decisions of a court of co-ordinate jurisdiction, and ought not to be disregarded or overruled except for the most cogent reasons. They apply directly to this case, and in my judgment were correctly decided.

I think that for the reason already given, the judgment should be reversed.

It may be remarked that, on a ground that may be technical, and was not taken on the argument, the same result would be reached. The testatrix directs that none of the legacies or interest given or bequeathed, shall be due or payable during the lifetime of her mother. A copy of the will is annexed to the declaration, and by averment, made part of it; and the death of the mother of the testatrix is nowhere averred in the pleading.

*Judgment reversed.*¹

¹ The law seems to be settled otherwise in Pennsylvania. *Townsend's Appeal*, 106 Pa. 268 (1884). See also *Ayer v. Ayer*, 128 Mass. 575 (1880); *Loring v. Thompson*, 184 Mass. 103 (1903); *Webb v. Lines*, 77 Conn. 51 (1904).

NOTE. — "Where the court decrees a legacy to be a satisfaction of a debt, the court gives interest always from the death of the testator." — *Per* LORD HARDWICKE, C., in *Clark v. Sewell*, 3 Atk. 96, 99 (1744).

The running of interest on a legacy "to be paid out of the money due on" a certain mortgage "when the same shall be recovered," does not depend upon the time when the money is recovered. *Wood v. Penoyre*, 13 Ves. 325 (1807). See also *Brooke v. Lewis*, 6 Mad. 368 (1822).

SECTION VII

DISTRIBUTIVE SHARES. ADVANCEMENTS.

ST. 22 & 23 CAR. II. C. 10 (1671). *An Act for the better settling of intestates' estates.* Be it enacted by the king's most excellent majesty, with the advice and consent of the Lords Spiritual and Temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, after the first day of June one thousand six hundred seventy and one, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz. :—

II. The condition of this obligation is such, that if the within bounden A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of _____ court, at or before the _____ day of _____ next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law; (3) and further do make or cause to be made, a true and just account of his said administration, at or before the _____ day of _____. And all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively, as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this Act, shall limit and appoint. (4) And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed

and approved accordingly, if the said A. B. within-bouden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void and of none effect, or else to remain in full force and virtue.

III. Which bouds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice: (2) and also that the said ordinaries and judges respectively, shall and may, and are enabled to proceed and call such administrators to account, for and touching the goods of any person dying intestate; (3) and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funerals and just expenses of every sort first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his Majesty's ecclesiastical laws: (4) saving to every one, supposing him or themselves aggrieved, right of appeal as was always in such cases used.

IV. Provided, that this Act, or anything herein contained, shall not anyways prejudice or hinder the customs observed within the city of London or within the province of York or other places, having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding.

V. Provided always, and be it enacted by the authority aforesaid, that all ordinaries and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following; that is to say, (2) one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: (3) and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall

make the estate of all the said children to be equal as near as can be estimated: (4) but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise from the intestate.

VI. And in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree and those who legally represent them.

VII. Provided, that there be no representations admitted among collaterals after brothers' and sisters' children: (2) and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: (3) and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever.

VIII. Provided also, and be it likewise enacted by the authority aforesaid, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made till after one year be fully expired after the intestate's death; (2) and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing to the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her ratable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.

IX. Provided always, and be it enacted by the authority aforesaid, that in all cases where the ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the will of the deceased in such testament expressed shall be performed and observed in such manner as it should have been if this Act had never been made.

ST. 1 JAC. II. c. 17, § 7 (1685). Provided also, and it is further enacted by the authority aforesaid, that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her; anything in the last-mentioned Acts to the contrary notwithstanding.

NOTE. — The husband was entitled to the wife's choses in action. St. 29 CAR. II. c. 3 § 25 (1677), p. 444, *ante*; *Cart v. Reeves*, 2 Eq. Cas. Abr. 423, pl. 7 (1718). Under the

Statute of Distributions, where the intestate leaves grandchildren and great-grandchildren, but no children, the estate is divided into as many shares as there are children who have left living descendants, and the descendants of each such child take the child's share by representation, the division among the descendants of each child being *per stirpes*. *In re Ross's Trusts*, L. R. 18 Eq. 286 (1871). And where the intestate left only grandchildren, the grandchildren were held to take *per stirpes* and not *per capita*. *In re Natt*, L. R. 37 Ch. D. 517 (1888).

A brother takes to the exclusion of a grandfather. *Evelyn v. Evelyn*, Ambl. 191 (1754). If the intestate leaves nephews and nieces, but no brothers or sisters, the nephews and nieces take *per capita*. *Walsh v. Walsh*, Prec. Ch. 54 (1696). And if there is no brother or sister, nephews and nieces must share with uncles and aunts, all taking *per capita*. *Durant v. Prestwood*, 1 Atk. 454 (1788).

Where the next of kin are all more remote than brothers and sisters, no one is entitled to take by representation. *Maw v. Harding*, 2 Vern. 233 (1691).

The half blood take equally with the whole blood. *Watts v. Crooke*, Show. P. C. 108. And see *Burnet v. Mann*, 1 Ves. Sr. 156 (1748).

Under the St. Jac. II. c. 17 § 7 (1685), where an intestate leaves a wife, mother, brothers, and sisters, but no issue, the wife takes half, and the other half goes among the mother, brothers, and sisters equally. *Keylway v. Keylway*, 2 P. Wms. 344 (1726). So where he leaves a wife, mother, and the children of a deceased brother, but no issue or brothers or sisters, the wife takes half; the mother a quarter; and the nephews and nieces, the other quarter. *Stanley v. Stanley*, 1 Atk. 455 (1789). And under the same Statute, brothers and sisters of the half blood, as well as of the whole blood, share with the mother. *Jessopp v. Watson*, 1 Myl. & K. 665 (1833).

A widow to whom a legacy has been given in lieu of all claims on the estate, may yet share in personal property which has become undisposed of by reason of a lapsed or void residuary bequest, *Pickering v. Stamford*, 8 Ves. 332 (1797); but not in personal property which is undisposed of on the face of the will. *Lett v. Randall*, 3 Sm. & G. 83 (1855).

RICKENBACKER v. ZIMMERMAN.

SUPREME COURT OF SOUTH CAROLINA. 1878.

[Reported 10 So. Car. 110.]

McIVER, A. J.¹ On the 24th January, 1870, the intestate insured his life for the sole benefit of his daughter Cornelia, and, having subsequently married a second time, died intestate on the 12th March, 1874, leaving as his heirs-at-law and distributees, his widow and two children of his last marriage, Ida and Ella, together with the appellant Cornelia. Under proceedings for partition and settlement of his estate two questions arose: 1. Whether such insurance was an advancement to the appellant. 2. If so, how should such advancement be valued. The Circuit Judge held that the insurance was an advancement, and that the value of the advancement was the sum named in the policy and received by the guardian of appellant. From this decision the appeal is taken.

In the absence of any direct authority upon these points, these questions must be determined upon the general principles regulating

¹ Only the opinion is given.

the law in respect to advancements, aided by such analogies as may be afforded by the decided cases.

In 1 Bouv. Law Dic., 76, the term "advancement" is defined to be "that which is given by a father to his child or presumptive heir by anticipation of what he might inherit." In *McCaw v. Blewit*, 2 McC. Ch., 91, the leading case on the subject of advancements in this State, no definition of the term is given in the decision of the Court of Appeals, but in the circuit decree it is defined to be "such a part of a man's estate as he gives to a child on marriage, or on setting out in life, which may be necessary for its settling in the world."

In the argument of this case the counsel for the appellant, who afterwards became one of the most eminent Chancellors of this State, questions the correctness of this definition, and says: "If a definition may be ventured, an advancement is the gift of a parent to a child beyond what by law he is bound to provide, from which a substantial benefit is to be derived by the child."

But, after long experience on the bench, this distinguished Judge seems to have reached the conclusion that it was not an easy matter to frame an accurate definition of the term. — *Murrell v. Murrell*, 2 Strob. Eq., 151. While, however, it is a difficult matter to frame such a definition as will cover every possible case, there are certain essential elements which every advancement must possess, one of which is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.

This is obvious from the very terms of our Act of 1791, (corresponding with the terms of Section 7, Chapter LXXXV, General Stat., p. 440,) as construed by the case of *McCaw v. Blewit*, *supra*; and, as Johnston, Ch., says in *Ison v. Ison*, 5 Rich. Eq., 19, "an advancement always embraces the idea that the parent has parted from his title in the subject advanced." Even the case of *Clark v. Wilson*, 27 Md., 693, which is much relied on by the respondents, recognizes this idea, for in that case it is said: "An advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the party making it and intestate," evidently implying that it must be a part of the ancestor's estate of which the child would be entitled to inherit a part in case of intestacy. So, too, in *Miller's appeal*, 81 Penn., 338, an advancement is said to be "a pure and irrevocable gift by a parent, in his lifetime, to his child, on account of such child's share of the estate after the parent's decease." And in *Dilman v. Cox*, 23 Ind., 442, it is said: "The true notion of an advancement is a giving by anticipation the whole or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

If, then, one of the distinguishing features of an advancement is that it must once have been a part of the ancestor's estate, which, but for the gift by way of advancement, would descend to his heirs, the next question to be considered is whether this policy of insurance or the money secured by it ever constituted any portion of the intestate's estate. The finding of fact by the Circuit Judge is that "the intestate in his lifetime . . . insured his life for the sole benefit of his daughter, Cornelia, . . . for the sum of four thousand dollars, payable upon his death, and then and thereafter paid regularly up to the time of his death an annual premium of ninety-nine 12-100 dollars," &c.

The policy recites that the first premium was paid by the said Cornelia, and upon what evidence, if any, the Circuit Judge based his finding contradictory of this recital does not appear. Assuming, however, as we must do, the correctness of the finding of the Circuit Judge, inasmuch as in the case agreed upon he says, after stating the facts as found by him, that "concerning the foregoing facts there was no dispute," the inquiry is whether this policy or the money secured by it ever constituted any part of the intestate's estate which, in any event, could have descended to and become distributable amongst his heirs and distributees, or which he could, by his will, have given to one or more of them. The authorities leave us in no doubt upon this point.

In *Bliss on Life Insurance*, (§ 317,) it is said the rule is "that a policy and the money to become due under it belong, *the moment it is issued*, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his or hers, by deed or by will, to transfer to any other person the interest of the person named." Again, at Section 328, the writer says: "Payment of the premium without any contract with the person entitled to the benefit of the policy gives no title to it." And, again, at Section 339, it is said: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums unless he has covenanted so to do; but if he does so, the person originally designated in the policy will derive the benefit."

To the same effect, see *May on Insurance*, p. 447, § 392.

The cases which were principally relied upon by the respondents do not, in our opinion, conflict with these views. The case of *Edwards v. Freeman*, (2 P. Wms. 435,) was this: Richard Freeman, in contemplation of marriage with his first wife, Elizabeth, by articles, covenanted with the father of Elizabeth, in consideration of the marriage and of a marriage portion of £5,000, to settle certain lands to the use of himself for life, remainder to said Elizabeth, remainder to his first and other sons in tail male successively, remainder to trustees for five hundred years to raise portions for the daughters of the marriage, payable at

eighteen or marriage, and to raise maintenance for such daughters, until their portions became payable, of £80 per annum. The marriage having been consummated and the only issue being one daughter, and Elizabeth dying, Richard Freeman married again and died intestate, leaving a widow and two children of the last marriage and the daughter of the first marriage. The question was whether the provision for the daughter of the first marriage could be regarded as an advancement: *Held*, That the £5,000 portion was an advancement, but not the annual provision for maintenance. The difference between that case and the one now before the Court is, that there the gift was of a portion of the intestate's estate, while here the sum of money secured by the policy never did constitute any part of the intestate's estate. For, as the Master of the Rolls says in that case, "the present case comes nearer to land than if it had been a charge out of land; for the trust of the five hundred years' term being only to raise this £5,000 portion, and the plaintiff, Mary Edwards, being the person who is alone entitled to it, she, as to this purpose, is, in effect, the owner of the five hundred years' term."

It was, therefore, practically a gift to the daughter of a lease for five hundred years of the lands specified; that is, it was a gift of a portion of the intestate's estate. *Kircudbright v. Kircudbright*, (8 Ves., 51,) was a case in which a father gave a bond to his son to secure the payment of a certain annuity until his son should be in possession of a living of a certain annual value, and by an agreement of the same date the son covenanted that he would forthwith enter into holy orders and accept such living. The father paid the annuity regularly for nine years, but the son failed to take orders and qualify himself for a living, and upon the death of the father intestate the question arose whether this annuity could be regarded as an advancement, and, if so, at what value it should be charged.

Lord Eldon, after expressing some doubt as to the legality of the transaction as being contrary to public policy, decided that, the son having failed to comply with the condition for nine years, the annuity was determinable by the father or his representatives, and that, while it should be regarded as an advancement, it was a very doubtful question as to how it should be valued, and, finally, gave the son the option to have it valued at the date of the grant or to estimate its value by the amount of the payments made under it. Besides, the fact that the very doubtful terms in which this decision was made deprives this case of much of the weight which it would otherwise possess; it may be remarked that here, too, the advancement was, practically, of a portion of the intestate's estate — the annuity being a charge upon that estate. It was also held in this case that a commission in the army, which the father had purchased for another son, was an advancement, to be valued at the sum paid for it, of which we will speak hereafter.

If, then, this policy of insurance never constituted any part of the estate of the intestate, the next inquiry is, was it something purchased

for the child with the funds of the father, and, if so, how and when is its value to be estimated. Assuming that the finding of fact by the Circuit Judge is correct, then it follows that this policy of insurance does possess this distinguishing feature of an advancement, viz., that it was a thing purchased with the funds of the father in the name and for the benefit of the child. The thing purchased being the policy of insurance, and the purchase having been made and the gift completed the moment it was issued, as we have seen above, that is as soon as the first premium was paid, the only remaining inquiry is how and when is its value to be ascertained. Our Act of 1791, differing in this respect from the statute of 22 and 28 Charles II, fixes this beyond dispute by declaring that such value shall be "estimated at the death of the ancestor, but so as that neither the improvement of the real estate by such child or children nor the increase of the personal property shall be taken into the computation," or, as it is stated in the leading case of *McCaw v. Blewit*, *supra*, in order to ascertain the amount at which an advancement is to be charged, it "is to be estimated at what it is worth at the time of the death, relation being had to its situation at the time of the gift." The advancement or thing given being the policy of insurance, and the time of the gift being the moment it was issued, to ascertain its value, according to the rule established by our statute as construed by our Courts, the inquiry is, not what it cost, as was held in *Kircudbright v. Kircudbright*, under the English statute, in reference to the commission in the army, because that is not in accordance with the rule as established by our statute, for, as is said by Johnston, Ch., in *Cooner v. May*, (3 Strob. Eq., 189,) "it is not the sum expended, but the thing which is bought with it—the thing received by the child—which constitutes the advancement; nor is the cost of the purchase the measure of the value of the thing advanced;" but the inquiry is, what a policy for a like amount, upon which the first premium had been paid, on the life of a person, with like expectation of life and of the same age as the father of appellant was when this policy was issued, be worth on the 12th March, 1874, the date of intestate's death?

It is true that it is stated that by one of the regulations of the company issuing this policy a policy drawn in favor of a minor child, as this was, is "neither purchasable nor assignable." But without stopping to inquire whether such a regulation, not incorporated in or forming a part of the policy, which is the contract between the parties, could abridge the rights of the holder of the policy, it is sufficient to say that the inquiry should be what would *such* a policy be worth at the date of the death of the intestate in the condition in which this one was at the time when it was issued, that being the time when the gift was made. If, however, from any cause, it should appear to be of no value, then the result would be that it was no advancement.

The question as to the payment by the father of the premiums subsequent to the first presents more difficulty; but we are inclined to

regard them as advancements of so much money: like the case of a father who, after having given his child a piece of property — a residence, for example, — expends considerable sums of money from year to year in making improvements or additions to the buildings. In such a case, the thing given is the money expended; and while it is true that ordinarily the sum expended does not furnish the rule for estimating the value of an advancement, yet where, as in this case, the thing given is money, there is no other mode of estimating its value except by the amount given.

The suggestion in the argument of respondents that the premiums paid might exceed the amount received on the policy, or that the whole might be lost by the failure of the insurance company, loses all its force in view of the decisions holding that the child is chargeable with the value of the advancement even though the thing constituting the advancement had ceased to be property before the settlement is made, as in cases of advancements in slaves. — *Manning*, 12 Rich. Eq., 410; *McLure v. Steele*, 14 Rich. Eq., 115.

So that we think the advancement in this case was, first, the policy of insurance, the value of which is to be ascertained in the manner above indicated, that being the thing which was purchased with the first premium, and that all subsequent premiums were advancements of so much money, which, of course, will bear no interest except from the time of the death of the intestate.

The authorities relied upon to show that the true value of the advancement in this case was the amount of money received by the child do not, in our opinion, sustain such a position, inasmuch as these cases are from States where the Statutes of Distributions are not like ours, and the decisions were made to turn upon the phraseology of the respective statutes.

In *Clark v. Wilson*, (27 Md., 693,) a father made a deed of trust of certain lands for the benefit of his children of the first marriage, reserving a life estate to himself. The questions were, first, whether the property conveyed by the deed of trust was an advancement, and, second, if so, whether it should be valued at the date of the deed or at the date of the father's death. It was held that the property was an advancement and that it should be valued at the date of the father's death, when the life estate fell in and the remainder took effect, or when the children received possession of the property.

The case turned upon the language of the Maryland statutes: "The value thereof at the time such advancement was received" — the Court construing those words to mean when the property actually goes into the possession of the child.

The case of *Wilkes v. Green*, (14 Ala., 443,) was this: A father made a deed of slaves to his children, reserving a life estate to himself, and the same questions arose. The Court, basing its decision upon the language of the Alabama statute, which provides that the value of the property constituting the advancement shall be fixed "at the time

it was delivered," held that the children were chargeable with the value of the property at the time they came to the actual possession of it.

In *Hook v. Hook*, (13 B. Monroe, 528,) a father conveyed to certain of his children certain lands and slaves, reserving a life estate to himself. The Kentucky statute provided that "all advancements should be estimated at their value when made," and the Court held that the advancement should be deemed to have been made at the time the advancement is "made complete by the actual possession and enjoyment of it." These cases, besides resting upon the particular phraseology of the several statutes of the several States in which they were decided, differ materially from the one now before the Court. In each of them the property constituting the advancement was a part of the father's estate *and continued in his use and enjoyment and under his control up to the time of his death*, while in the case now under consideration the policy of insurance was never a part of the father's estate and was never in his own use or under his control. The case of *Meadors v. Meadors*, (11 Iredell, 148,) is likewise relied upon. That case, however, turned upon the special provisions of the North Carolina statute and throws no light upon the questions we are considering. Many of the cases from other States cited in the argument hold that the question of advancement is one of intention, but such does not seem to be the rule in this State.

In *Rees v. Rees*, (11 Rich. Eq., 86,) it was held that whether property given by a parent to a child shall be considered as an advancement is not a question of intention. It is very true that what is or is not an advancement may depend upon the circumstances or condition of the parties, as in *McCaw v. Blewit*, 2 McC. Ch., 91; *Murrell v. Murrell*, 2 Strob. Eq., 148, and *Ison v. Ison*, 5 Rich. Eq., 15; "but the mere declarations of the donor cannot alter the operation of the law either as to the character of the gift or even the mode of valuation."

The judgment of the Circuit Court, in so far as it conflicts with the principles herein announced, is set aside and the cause remanded for further proceedings in accordance with the principles herein established.

WILLARD, C. J., and HASKELL, A. J., concurred.

NOTE. — Children have to account for advances to their parent. *Proud v. Turner*, 2 P. Wms. 560 (1729); *Quarles v. Quarles*, 4 Mass. 680 (1808); *Hughes's Appeal*, 57 Pa. 179 (1868). But see *Person's Appeal*, 74 Pa. 121 (1873).

SECTION VIII.

REFUNDING OF LEGACIES PAID.¹

NEWMAN v. BARTON.

CHANCERY. 1691.

[Reported 2 Vern. 205.]

THE question being whether an executor should compel a legatee to refund. And the case of *Grave and Bainson* cited, where one legatee being paid in full his whole legacy, and there wanting assets to pay the other legacies, it was decreed for the benefit of the unsatisfied legatees, that the legatee who had received his full legacy, should refund, and be paid only in proportion; and the case of *Hodges and Waddington*, where a creditor compelled a legatee to refund.

PER CURIAM. A creditor shall follow the assets in equity, into whose-soever hands they come. But where the executor had voluntarily paid the full legacy, and afterwards assets proved deficient to pay the other legacies, they conceived neither the executor, nor any of the other legatees should compel him to refund; but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded.

WALCOT v. HALL.

CHANCERY. 1788.

[Reported 1 P. Wms. 495, note.]

J. PEARCE by will, gave to the plaintiff £50 to be paid to him at his age of 21 years, or day of marriage, the same to be put out at interest in the name of his executor, Charles Pearce Hall, &c. He then disposed of the residue, and appointed C. P. Hall executor. Hall proved the will, retained the £50 for the plaintiff's legacy, and paid over the residue to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of 21 filed this bill against the executor and the residuary legatees for payment of the legacy. His Honor [SIR LLOYD KENYON, M. R.] said the residuary legatees could not be liable; that the distinction was between the cases, where there was originally a deficiency of assets, and where the executor had wasted them; in the former case, a legatee, who had been paid more than his proportion, must refund to the others; but here the residuary legatees had received no more than they were entitled to, and the executor was therefore the only person to be resorted

¹ In addition to the cases here printed, see *Anonymous*, p. 579, *ante*; *Davis v. Davis*, p. 579, *ante*.

to. And his Honor, being of opinion that this demand, as against the executor, was barred by his certificate, dismissed the bill. *Sed vide Orr v. Kaimes*, 2 Vez. 194.¹

GITTINS v. STEELE.

CHANCERY. 1818.

[Reported 1 Swanst. 199.]

IN preparing the minutes of the decree on the appeal in this case [reported 1 Swanst. 24], a question arose whether in refunding so much of the legacy of £7,000 as had been paid out of the personal estate, the legatees of that sum, who were also residuary legatees, should be charged with interest.

Mr. Bell, *Mr. Owen*, *Mr. Horne*, and *Mr. Trower*, for different parties, opposed the charge of interest.

Mr. Wetherell, in support of the charge.

THE LORD CHANCELLOR [ELDON]. Where the fund out of which the legacy ought to have been paid is in the hands of the court making interest, unquestionably interest is due. If a legacy has been erroneously paid to a legatee who has no farther property in the estate, in recalling that payment I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share.

The order directed payment of interest at the rate of 4 per cent. Reg. Lib. A. 1817, fol. 1689.

DAVIS v. NEWMAN.

COURT OF APPEALS OF VIRGINIA. 1844.

[Reported 2 Rob. 664.]

ALLEN, J.² The testator, after making large specific bequests, directed the residue of his estate to be divided into six parts, of which the executor was to have one, and the remaining five were divided

¹ s. c. 2 Bro. C. C. 305.

See *Anon.*, 1 P. Wms. 495 (1718); *Fenwick v. Clarke*, 31 L. J. Ch. 728 (1862); *Peterson v. Peterson*, L. R. 3 Eq. 111 (1866); *Lupton v. Lupton*, 2 Johns. Ch. 614 (N. Y. 1817).

² Only a part of the opinion is given.

among his children and grandchildren. He owed no debts, and the executor proceeded to make sundry payments to the five legatees. The payments were voluntary; but, as it is alleged, were made under a mistake of fact as to the value of the assets. When the money was paid, all parties supposed that a bond given by Thomas Macon to the testator in his lifetime for a large amount, was good and would be collected; and the executor, in settling with the legatees, acted under that impression. The bond has turned out to be unavailing. Macon, though in the possession of an immense estate at the testator's death, was in truth greatly embarrassed, and subsequently gave deeds of trust which exhausted all his property. There being no creditors of the testator the executor now seeks to recover back for his own benefit the sums overpaid to the legatees.

In 1 Roper on Legacies 815. it is said to be a rule in equity, to presume, when an executor voluntarily pays one or more legacies, that he has received sufficient assets to discharge the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since he will not be permitted to institute proceedings (except in particular instances) against the legatees so paid, to oblige them to refund. See also 2 Lomax's Digest 173. 2 Williams on Ex'ors 892. 1 Eq. Ca. Abr. 239. The cases referred to by Roper of *Noel v. Robinson*, 1 Vern. 94. *Newman v. Barton*, 2 Vern. 205. *Coppin v. Coppin*, 2 P. Wms. 292. and *Orr v. Kaines*, 2 Ves. sen. 194. seem to me fully to sustain the position that in England, where the executor has made a voluntary payment, he cannot compel the legatee to refund: though there may be good reason to doubt whether they fully justify the position that such payment is an admission of assets sufficient to pay all the rest of the legatees, and that, though the fact may be otherwise, equity will not admit evidence to that effect. The authority for this proposition is the opinion of Sir John Strange, master of the rolls, in 2 Ves. sen. 194. That opinion has been reviewed by President Tucker in *Gallego's ex'ors v. Attorney General*, 3 Leigh 488. and he there shews, that Sir John Strange merely says such payment furnishes a presumption of the sufficiency of assets to pay the rest of the legacies, but does not say the presumption is conclusive. In the opinion of President Tucker, such presumptions, like all others, are liable to be rebutted, and although an executor may have been willing to encounter the hazard of paying one, it furnishes no reason for being compelled to pay the rest out of his own pocket.

I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications. In England, the executor is personally bound if he fails to plead. A judgment against him on any plea except *plene administravit*, or a plea admitting assets to a sum certain and *riens ultra*, is conclusive on him that he has assets to satisfy such judgment.

Our statute (1 R. C. p. 384. ch. 104. § 36.) has altered the law in this respect, and a failure to plead, or misleading, subjects him to no personal responsibility. To hold that a voluntary payment to one legatee is an implied admission of assets sufficient to pay all, would be giving to such implied admission *in pais* an effect to which the statute has declared an admission on record shall not be entitled. For, by any other than the plea of *plene administravit*, he was held to admit assets. 1 Wms. Saund. 335. note 10.

But as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment if voluntarily made. And no case has been cited which shews that such a bill has ever been sustained in England. It is certainly not shewn by those cited from 1 P. Wms. 495. and 2 P. Wms. 447. In Virginia the question has never arisen. *Burnley v. Lambert*, 1 Wash. 308. was a suit by the legatee to recover slaves bequeathed to him, and which had been seized and sold on an execution against the executor after he had assented to the legacy. Judge Pendleton, after deciding that the assent of the executor to the legacy vested the legal title in the legatee, which could not be divested at law by the creditor, remarks that the creditor is not without remedy; he may follow the assets in the hands of the legatee, or proceed against the executors, in which case the executors have their remedy in equity to compel the legatee to refund. It does not appear from the report, whether the debt was one of which the executor had no previous notice; and it was unnecessary for the court to enquire into that matter. If it was a debt of which he had no notice before paying away the assets to legatees, he had a right to compel the legatees to refund. *Nelthrop v. Biscoe*, 1 Ch. Cas. 135. And as the assets are always bound to the creditor, and he may pursue them in the hands of the legatee even though the testator's effects would have been sufficient to pay both debts and legacies, (1 Vern. 162.) there might be good reason for holding that where the executor paid a legacy with notice of a debt, believing the assets to be sufficient, and they proved insufficient to pay both, he should be permitted to compel the legatee to refund. The legatee takes subject to the liability of being compelled to refund at the suit of a creditor. And where the executor has not been culpable, and is compelled to pay the debt, it seems to me he should be substituted to the rights of the creditor he has paid. So far the strict rule of the English courts might properly be relaxed in conformity with the more liberal spirit of our legislation in regard to executors, and with the principles which led the court to give relief in *Miller's ex'ors v. Rice &c.* 1 Rand. 438.

Jones v. Williams, 2 Call 102. was a controversy about accounts, and the question could not have arisen; for the money advanced to the distributee was advanced as a loan, to be returned if on a settlement he was not entitled to it; and for that reason the executor was allowed interest on the sum decreed to him.

Bowers's ex'or v. Glendening &c. 4 Munf. 219, decides merely that

an executor against whom a creditor obtains a decree may compel the legatee to refund.

In *Gallego's ex'ors v. Attorney General*, 3 Leigh 450. it was decided that where the estate proved deficient by an unexpected depreciation of the property after some of the legatees were fully paid, the unpaid legatees have a right to look to the executors for their ratable proportions of the fund, and are not bound to have recourse to the legatees who were fully paid to compel them to refund. In England, the unsatisfied legatee cannot maintain a suit against the legatee fully paid to compel him to refund, if the executor is solvent. Such Judge Tucker lays down to be the rule; and therefore, though he was of opinion in *Gallego's ex'ors v. Attorney General* that the executors were liable only for the ratable proportion of the legacy, and not for the whole, upon the ground that payment in full to one was an admission of assets sufficient to pay all, he still held, that as the executors were quite solvent, the legatees had no right to call upon those paid to refund. The case did not call for a decision on this point, and the other judges did not notice it. If, as I conceive, the executor who has been made liable at the suit of the creditor can only be permitted to compel the legatee, whom he has voluntarily paid, to refund, by substituting him to the rights of the creditor, who could have proceeded in the first instance against the assets; where it is shewn that no such original right to charge the assets exists, there is no right to which the executor can be substituted.

But even if, in a case where there was an original deficiency of assets, (as in *Gallego's ex'ors v. Attorney General*) it should be held that the executor, having through mistake paid one legatee in full, and having afterwards been compelled to pay the proportions of the others out of his own pocket, might compel the legatee overpaid to refund; the case would still fall short of that under consideration. Here the executor has not been called upon by a creditor to make good assets improperly paid away, or by an unpaid legatee to pay him a ratable proportion of his legacy out of his own pocket: he is seeking to recover for his own benefit alone. To sustain his claim to such a recovery would be against the whole series of authorities in England, commencing at an early period, and without the support of a single authority or *dictum* in our own courts.

It is the duty of the executor to make himself acquainted with the condition of the estate. The means are in his own hands, and if he neglects to avail himself of them it is his own fault. He is not compelled to pay the legatees until the debts are discharged, and until he has ascertained the precise extent of the assets. He can decline paying except under the decree of a court, and then he is entitled to call upon the legatee to refund if the estate was originally deficient; and he may with us always require a refunding bond. If, without using any of these precautions, he voluntarily pays the legatee, the latter has a right to consider the money as his own;

subject, it is true, to be called upon to refund at the suit of creditors, or of an unpaid legatee if the assets were originally deficient. But these are contingencies too remote in his apprehension, when a payment has been made to him under such circumstances, to have any influence on his conduct. The hardship of the case is greater upon the legatee than the executor. He has been in no default. No duty was imposed upon him to examine into the state and condition of the assets. He receives what a payment under such circumstances has impressed him with a conviction he will never be called upon to refund. Such unexpected additions to men's fortunes are frequently spent without much consideration; wasted in the gratification of some want to which the legacy has given birth, or released to some more needy relative. It would be the grossest injustice, under such circumstances, to permit the executor, who had thus misled him by his negligence or inattention to his duties, to compel him at some distant day to refund the money. The case of a legatee, and as between him and the executor, seems to me much stronger than the cases of *Brisbane v. Dacres*, 5 Taunt. 144. 1 Eng. C. L. Rep. 43. and *Skyring v. Greenwood*, 4 Barn. & Cress. 281. 10 Eng. C. L. Rep. 335. in the first of which cases Gibbs, J. remarked, that he who receives money so paid "has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

CHAPTER VIII.
GIFTS MORTIS CAUSA.

DRURY v. SMITH.

CHANCERY. 1718.

[*Reported 1 P. Wms. 404.*]

A. HAD a nephew, and being about making his will, directed the scrivener employed by him for that purpose to give £100 to his nephew; afterwards the testator, recollecting that his nephew had £100 of his in his hands, therefore ordered the scrivener not to put the legacy into his will, in regard his nephew had already that £100 in his own hands, and the testator made B. (that was his niece) executrix and residuary legatee.

Afterwards the nephew came, and brought a specie bill for this £100 to the testator, who, in his last sickness, gave the said £100 bill to be delivered over to his nephew, in case he [the testator] should die of that sickness, which did accordingly happen.

And now, on the nephew's bringing a bill against the executrix, for this £100 note, it was objected, that this being a parol gift, and contrary to the will by which the executrix was made residuary legatee, it would introduce all the inconvenience of perjury which the Statute of Frauds intended to prevent, if such evidence, or verbal dispositions, should prevail against the will, and would be contrary to the words of the Statute, which say, a will in writing shall not be revoked by parol.

LORD CHANCELLOR. [LORD COWPER.] The case is not so strong as if this very £100 note had been specifically devised; for devising the *residuum* is only the rest of his estate, that he should not, by will or otherwise, dispose of; but this is a gift in the testator's life-time, *donatio causa mortis*, and the possession transmuted, and certainly, notwithstanding the will, the testator had a power to give away any part of his estate in his life-time; he might in his life-time, after the making of his will, give away any part of his estate *absolutely*, and by the same reason might, notwithstanding the will, give away any part thereof *conditionally*; and this gift being so fully proved:

Decree the plaintiff his £100 bill with costs.

MILLER v. MILLER.

CHANCERY. 1735.

[Reported 3 P. Wms. 356.]

ONE having a wife and a son that was his only child, two days before his death made his will, giving thereby to his wife £150 per annum, in long exchequer annuities, during her widowhood. After which the same day he made a codicil, by which he gave to his said wife a further exchequer annuity and £600 in money, to be paid her immediately after his death. Subsequent to this, and about an hour before his death, the testator having called to his servant to reach him his pocket-book, took thereout two bank notes for £300 each, and another note for £100 (not being a cash note, or payable to bearer) all which notes he ordered his servant to deliver to his wife (then present) adding, that he had not done enough for her. But the wife for some time declined taking these, having, as she said, enough already, and for that it would injure their son, who was the residuary legatee in the will. Nevertheless, at length she was prevailed on by her husband to accept of the two bank notes, and also the other note. After which the testator by word of mouth gave her his coach and a pair of his coach-horses, bidding three witnesses then present take notice of it, and that he was in his senses, who accordingly made a memorandum thereof in writing.

On a bill brought in the name of the infant son by his *prochein amy*, against the widow and the executors, for an account of the testator's personal estate, it was insisted on behalf of the plaintiff, that since by the codicil a legacy of £600 was given to the wife, payable immediately after the testator's death, the delivery of these two bank notes amounting to just the sum of £600 was a payment of such legacy in the testator's life-time; and with regard to the other note for £100 which was not payable to bearer, that was merely a *chose en action*, and consequently could not pass by a delivery thereof. Also as to the coach and horses, these were not delivered in the testator's life-time, for which reason the widow could have no claim to them.

MASTER OF THE ROLLS. [HON. JOHN VERNEY.] The gift of the £600 contained in the bank notes was a *donatio causa mortis*, which operates as such though made to a wife, for it is in nature of a legacy, but need not be proved in the spiritual court as part of the testator's will. Neither are gifts of this kind good, unless made by the party in his last sickness. And though in the principal case the sum be the same with the £600 money legacy given by the codicil, yet the manner of giving these notes, together with the expressions then made use of by the husband, declaring that he had not sufficiently provided for his wife, manifestly show them to have been designed as additional. On the other hand, the wife by declining at first to accept of them, appears to have been no craving woman.

But then as to the note for £100 which was merely a *chose en action*, and must still be sued in the name of the executors, that cannot take effect as a *donatio causa mortis*, inasmuch as no property therein could pass by the delivery, much less can the widow be entitled to the coach and horses, of which there was no delivery in the testator's life-time.

SNELGRAVE v. BAYLY.

CHANCERY. 1744.

[Reported Ridg. temp. Hard. 202.]

THE question in this case was whether a bond or other *chose in action* may be granted by way of *donatio mortis causa*.

LORD CHANCELLOR. [LORD HARDWICKE.] I had some doubt whether there could be a *donatio mortis causa* of a bond or other *chose in action*, because a bond considered at law as a thing in possession, is no more than the wax and paper, and no more can pass at law by the gift of such bond; but the beneficial property or interest is the debt which at law still remains in the power of the donor, notwithstanding his gift of it to another: but equity has introduced great alteration in *choses in action*, and continually supports the assignments of them in such manner, that, if an obligee assigns a bond, and the obligor has notice of it; yet if he after such notice will pay the money to the obligee, though at law it is a good payment, and the obligee can well release it, yet in equity the obligor shall be obliged to pay the money over again to the assignee; so, if a bond is lost at law, the debt is lost, because the obligee cannot sue at all; for though the loss of such bond may be given in evidence upon the trial well enough, yet the plaintiff will be wrecked before he has advanced to a trial: for upon his declaring, he must make a *profert* of the bond, and give *oyer* of it, which it is impossible for him to do, when his bond is lost. But in equity, though the bond is lost, yet the demand contained in it is not, for he may recover the money in this court; therefore I am now satisfied, that this is a good *donatio mortis causa* of the bond, and it is the stronger by reason of the extent to which this court has gone in supporting assignments of *choses in action*:—the testator might have assigned this bond, and though he had done it voluntarily, this court would have maintained it against himself, or any person claiming under him; therefore this court supports equitable interests in the same manner as if they were in possession. The testator gave this bond to the defendant in his sickness, with all the circumstances and expressions to make it a valid gift, *mortis causa*, here, says he, take this bond, it is yours; if I die, I give it to you, that you may have something after my death. This is read out of the donee's own answer, and is clear proof and stands uncontrovertible.

Suppose the testator in the present case had bought chattels and taken them in a bill of sale in a trustee's name, so that he would have had only an equitable interest, the legal property being in the trustees; suppose the *cestui que trust* had had possession of the goods, and on his death-bed had delivered them over to the defendant in such manner as he has done the bond: this would have been a good *donatio causa mortis*, and yet there he had no more than an equitable interest, and no legal one; and such gift would bind the equitable interest as much as it would the legal property, if the party had had it.

The two cases or authorities are strong as to this purpose, that in 1 Wms. 441, is in point: there the testator intended to give £100 to his wife, and drew a note on his goldsmith for that sum, payable to his wife; the note vested in the husband, and was the same as if it had been to have been paid to the husband himself, and the demand upon the goldsmith was a *chose in action* in the husband himself; and yet a *donatio mortis causa* of such note was decreed to be valid; and that does not at all differ from the case of a bond.

The other case in Chancery Precedents, 300, as to the opinion given at the Rolls, is equally strong with the former. There the testator gave to A. a hair-trunk with all that was in it; there happened to be a tally on the Government, enclosed for £500, which was a *chose in action*. The trunk itself was no more than the *res continens* of no value; the Master of the Rolls decreed it as a *donatio mortis causa*; upon appeal, the Chancellor was of another opinion, but upon another foundation; not that the *donatio mortis causa* was not good, but that a subsequent will was a constructive satisfaction of it, and that both gifts should not stand. I don't say, that this was a direct opinion on this question; yet it does not contradict, I think, the present case, being like the cases of equitable assignments of *choses in action* it must stand.

Dismiss the bill without costs.

WARD v. TURNER.

CHANCERY. 1752.

[Reported 1 Dick. 170.]

THE plaintiff, as representative of John Mosely, brought his bill to have a transfer of £600 new South Sea annuities, and several specific parts of the personal estate of William Fly, delivered to him; and to have an account of what was due to Mosely for services done to Fly.

It appeared, that Fly in his life-time had expressed great kindness for the plaintiff's testator; and in the presence of one Mounsey, a witness, had taken three transfer receipts for £600 South Sea annuities, and

declared he would give them to the plaintiff's testator; and in the presence of one Greentree, another witness, taking the key of his scrutore, took out three papers, and said, "Here, Mosely, I give you these three papers: these are for South Sea stock, and will serve you when I am dead;" and in the presence of one Taylor declared, he gave the plaintiff's testator all the goods and plate in his house, save his sword, gun, and books.

LORD HARDWICKE, C.¹ Suppose the facts above sworn to were well proved, what is the law arising on these facts?

First, as to any part of the things given, except the £600 South Sea annuities, I am of opinion the gift is not good, there being no pretence of any delivery, and it is too general. If they prove anything, they must prove a nuncupative will.

Then for argument's sake, take the gift of the £600 South Sea annuities, as an independent donation; the question is, whether it be such a gift as the law of England will allow as a *donatio causa mortis*. And first, the fact of the gift is proved only by Greentree, whereas the civil law requires five witnesses, and limits it in point of value. *Vide* Justinian's Institutes. The express gift sworn by Greentree is of the three receipts only, which the plaintiff would construe as a gift of the South Sea annuities.

The question that arises is: whether the delivery of the thing, given by way of *donatio causa mortis*, is necessary; and if necessary, if this delivery of the three receipts is a sufficient delivery. I am of opinion a delivery is necessary, and that the delivery of the three receipts is not sufficient to validate this act.

In the Roman law there are three kinds of *donatio mortis causa*. First, where the property in the thing doth not vest, until the death of the donor; second, where the property immediately passes, but is defeasible, in case the donor recovers; third, where the donor moved with present danger, doth not think it so immediate as to give the party a vested interest in them, but only to take effect, when the donor dies.

Now, as to the second, the civil law requires a delivery; but as to the first and third, not an absolute delivery, because the property doth not completely pass till the death of the donor.

But the civil law is not binding in this country, farther than it hath been received, and allowed here, and that must be determined by authorities; and the result of the authorities is, that the civil law hath been received in England, only so far as the gift hath been attended with delivery. *Swinburne*, part 1st, § 6; *Drury v. Smith*, 1 P. Wms. 404; *Lawson v. Lawson*, Ibid. 441; *Jones v. Selby*, Precedents in Chan. 300; *Hedges v. Hedges*, Ibid. 269; *Snellgrove v. Bailey*, March, 1744, 3 Atk. 214; *Miller v. Miller*, 3 P. Wms. 356.

Then I come to the question, whether the delivery of the three receipts is a delivery of the thing; I am of opinion it is not, and find no

¹ Lord Hardwicke's opinion is given more at length in 2 Ves. Sr. 431.

authority for it; the delivery of the thing given, is what is relied on in all the cases; the only case where a symbol was held good, was in *Jones v. Selby*; the key of the trunk wherein the thing was kept (Exchequer Tallies), but I am of opinion that amounted to a possession in the donee of the tallies, for the donor was restrained from making use of them, without the consent of the donee, and the donor could not rightfully come at them, without the key.

I think in like manner, as to a key of a warehouse for goods, or of a wine cellar.

But as to the delivery of the receipts for the stock, it amounts to nothing; they being of no use after the acceptance of the stock, and are seldom kept.

Suppose a mortgage and a separate receipt taken for the consideration money, and the receipt is delivered over, it could not be a delivery of possession.

Upon the whole I am of opinion this gift is not valid, without a transfer, or something that amounts to a transfer, and it being unaccompanied with a delivery, is merely legatory, and amounts to a nuncupative will, and allowing it would be a breach of the Statute of Frauds. Therefore let the bill be dismissed as to the gifts claimed.¹

TATE v. HILBERT.

CHANCERY. 1793.

[Reported 2 Ves. Jr. 111.]

THE plaintiffs in these causes were relations of Mark Bell: Jane his niece; and Mary his great niece. The object of the first bill was to have a banker's cheque for £200 paid, either out of £800 cash belonging to Mark Bell in his banker's hands at the time of his decease, and admitted by the defendant, the executor, to have been possessed by him, or out of his general assets. The cheque was in this form: — "Pay to self or bearer £200. MARK BELL."

The other bill was to have payment of a promissory note, for £1000 to the plaintiff Jane, signed by Mark Bell. These claims were made upon the footing of *donatio mortis causa*, or as appointments in nature of it. Mark Bell by his will, made in November, 1789, gave to the plaintiff Mary a legacy of £500, and to the plaintiff Jane a legacy of £100 and an annuity jointly with his sister for the lives of them and the survivor. He made several other bequests to a great amount; but gave the bulk of his fortune to his son; who afterwards became a luna-

¹ In *Moore v. Moore*, L. R. 18 Eq. 474 (1874), the deceased delivered to his wife certificates for shares in a railway corporation. The court was of opinion that the shares could not be the subject of a gift *causa mortis*. In *In re Weston*, L. R. [1902] 1 Ch. 680, the court held that shares in a building society could not be the subject of such a gift, although delivery of the certificates was made.

tic. The transaction of the gifts to the plaintiffs, who were mutually evidence for each other, rested solely on their testimony; as no other person was present at the time. On their testimony it stood thus: "The testator sent for Mary Tate from London to his house at Battersea. On 25th January, 1790, he observed, that he was worth more than he thought; that his fortune was too much for one person; and therefore he would give away more than he had given by his will. He then desired Jane to give him out of his desk several bonds and securities to the amount of upwards of £3000 which he cancelled by tearing off the seals. He then told Mary, he would give her £200; and desired Jane to give him a cheque out of the drawer of his desk; which she did; and he immediately filled it up, signed it, and gave it to the plaintiff Mary. This was the cheque, upon which the first bill was founded. At the same time he gave the plaintiff Jane the promissory note for £1000 which was the subject of the other. The testator was infirm, but of sound mind at the time; and was not pressed or asked by either of the plaintiffs to do anything for them."

On January 26th the testator made two codicils; by one of which he revoked a devise to a nephew; and gave a legacy in lieu of it; and gave some diamonds, furniture, plate, &c. In the other he mentioned, that he had cancelled debts due to him from his two nephews; which were the securities he had according to the evidence of the plaintiffs cancelled the preceding day. The codicil expressed his intention by that cancellation to release those debts; and it also discharged other debts from other relations. Neither codicil took notice of the transaction of the preceding day, on which these bills were founded. The testator died four days after the codicils were made. He was eighty-three years old and very infirm: but there was no evidence of any particular illness.

The Solicitor-General [Sir John Mitford] and *Mr. Hollist*, for the plaintiffs.

Mr. Mansfield and *Mr. Campbell*, for the defendant.

LORD LOUGHBOROUGH, C. By the first of these bills it is supposed, that this cheque is totally ineffectual without the aid of this court. I have given the case much attention from a settled persuasion, that upon the part of the plaintiffs it is a proceeding perfectly fair and honest: but, though that is the color of the facts in the present instance, yet these cases are liable to the observations, which have been made, that to make a stretch to effect gifts, made to persons surrounded by relations who give evidence for each other, would be attended with great inconvenience. There is no doubt, that in this case the transaction is fair. If it fails, it is a case of mistake upon the part of the person, meaning to give, and also of mistake, or delicacy, upon the part of the person, to whom the gift was made; as if she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to

think, no court would have taken it from her. But with all the disposition I feel to make it effectual, I must resist that impulse; as nothing is so dangerous as to decide upon circumstances of favor to particular parties; and, unless I can find some solid ground to support it, so that there will be no danger from the precedent, I cannot decree for the plaintiff. The claim of the plaintiff Mary is supported upon the ground, that the delivery must be *donatio mortis causa*; and is within the description given by Swinburne; and operated as an appointment of so much money in the banker's hands in favor of the person put in possession of the note, payable to bearer; and in support of this *Lawson v. Lawson*, 1 P. Will. 441, was cited and commented on. Upon the other hand it was contended, that this was a banker's cheque, a common cash note; and that it would be a strain and confusion of terms to constitute it an appointment; that it is simply a gift: that they cannot claim as a legacy, nor as a debt; and therefore that this court will not give it more effect than it would have at law. I have looked into the cases; of which there have been several upon this question. The reasoning is generally taken from the civil law, and with great propriety; as the jurisdiction, in which these cases may as well occur as here, is the Ecclesiastical Court, which has properly followed the reasoning of the Roman law. All the passages in Swinburne are only references to different texts of the civil law; and where he defines *donatio mortis causa*, he is coupling the description of a legacy with a very short text of the civil law; and there is a perplexity in it. He takes it from a part of the civil law compiled at a time, when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy.

There are three species, of which he takes notice; first where a person, not terrified by fear of any present peril, but moved by the general consideration of man's mortality, makes a gift: the second is, where a person, being moved by imminent danger, gives so that the subject is immediately made his, to whom it is given: the third is where a person being in peril of death, gives something, but not so, that it shall presently be his, that received it, but in case the giver dies. The two first are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations; and rates them all under the general title *Donatio mortis causa*. That is the time, when it was in dispute. "*Julianus libro 17 Digestorum tres esse species mortis causa donationum ait; una cum quis nullo presentis periculi metu conterritus, sed sola cogitatione mortalitatis, donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.*" If he had looked a little farther under the same title, he would have found there an opposite, but a much more correct, opinion; which finally prevailed, and was established as legal. It is the 27th law. "Ubi

ita donatur mortis causa, ut nullo casu revocetur, *mors*" (that must be supplied) "causa donandi magis est, quam mortis causa donatio : et ideo perinde haberi debet atque alia quævis inter vivos donatio : ideoque inter viros et uxores non valet ; et ideo nec Falcidia locum habet quasi in mortis causa donatione." In the institutions in the time of Justinian, Tit. 7, *De Donationibus*, there is a history given of these contests that had prevailed : and a definition is strictly given of what shall be *Donatio mortis causa*. "Mortis causa donatio est, quæ propter mortis fit suspicionem ; cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit ; sin autem supervixisset is, qui donavit reciperet : vel si eum donationis pœnituisset : aut prior decesserit is, cui donatum sit. Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia ; nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quedam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur ; et sic procedat quemadmodum nostra constitutio eam formavit : et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum."

There it is clearly and correctly defined, that it had in effect the nature of a legacy ; was liable to debts ; and that it was only a gift upon survivorship ; and the danger of suffering these gifts to be taken loosely occasioned at the same time with the passage, I have read, an ordinance by the Emperor, that it should be in writing with five witnesses. In the case before Lord Hardwicke, in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined ; but considers clearly, that by the law of England it cannot be a present, absolute, gift, but to take effect on the death of the party ; and, following the line there, and supporting his own authority, he considers delivery essential. It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps it might not be difficult to conceive, that it might be by deed or by writing. It is clear, it could not be by mere parol ; as saying, "*I give*," without an act, does not transfer the property. So far I concur with the reasoning in that case. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the Ecclesiastical Court : and that the property so given is not to be possessed by the executor. It is bad against creditors ; and therefore within the reach of creditors ; but does not regularly fall within an administration ; or require any act by the executor to constitute a title in the donee.

It was observed for the defendant, that the case of *Lawson v. Lawson* was overturned by Lord Hardwicke. I have caused the Register's book to be searched ; and the report in P. Williams is certainly inaccurate : but the decision is perfectly right. The only doubt remaining with regard to the case was, whether it was not necessary in point of form to have authority from the Ecclesiastical Court : but I think the

Master of the Rolls was right in not requiring probate. As it stands in the book, you take it only as matter of fact and evidence, that the money, for which the bill was given, was to be applied in mourning: but by the Register's book that was actually indorsed upon the bill. According to that in fear of a sudden change he did give to the defendant £100. That was an immediate gift. It proceeds to say that he drew a bill upon the defendant Middleton payable ten days after sight; and by a note in the bill of his own handwriting declared it to be for this defendant for mourning; and refers to the said note in writing in her custody. There were also contained in it directions concerning the children's mourning. The only question that could arise there, had the argument taken a larger scope, than it did, was, whether this note should be proved. In the report you do not see the *ratio decidendi*. In one part the Master of the Rolls states it as an appointment; in another he lays stress on its being for mourning: but it was not necessary to prove it; as, taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of £100 for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose, I was to apply that idea of an appointment, this is to take effect presently; and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death: but it is stronger in this particular case; as by the evidence it was given, and fairly given. At the time he made this gift the act he was about to do was not legatory, to bequeath; on the contrary from the conversation, that took place, and the act, he was about to do, having considered what he had done by his will he meant to give more; and in doing so to make effectual gifts. Under that idea he cancelled those securities; not meaning them to be unavailable only in case of his death. In the same way he meant what he did for these plaintiffs as immediate gifts. Therefore I can make no more of this. I do not like to take it up upon favor to the parties, or to speculate upon it as an appointment. Being a gift it cannot be sued for as a legacy. I cannot make it better. If the law will not allow her to recover against the executor any more than against the banker, I lament it: but I cannot give it more effect than it can have at law. I do not know, whether it has been considered as to the possibility of bringing an action against the executor. If the promissory note can be made good at law, one should feel no reluctance to make it good: but they must stand, as they are at law; and this court cannot give the parties any relief. If there is anything intended to be done at law, I should have no difficulty to retain the bill; as if any accounts were to be had as to assets.

It was admitted, that the assets were abundant.

The Attorney-General [Sir John Scott] for the plaintiffs, said, that as to the promissory note they had opinions of common lawyers in favor of an action. He therefore desired time to consider upon it.

THE LORD CHANCELLOR asked, whether any hope was entertained, that they could recover at law upon the draft on the banker? The Attorney-General said, he did not know of any.

The first bill was then dismissed: but upon the application of the Attorney-General, without prejudice to any action at law; in order that it might not be considered as an authority against such action.¹

GARDNER v. PARKER.

CHANCERY. 1818.

[Reported 3 Madd. 184.]

RICHARD CROSSLEY being on terms of intimacy with the plaintiff (who had rendered the deceased various services), and being seriously ill, and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for £1,800, saying, at the same time, "There, take that and keep it." The defendants were the executors of Crossley, and the prayer of the bill was, that the plaintiff might be declared entitled to the bond; and that the defendants might be decreed to execute proper instruments to enable the plaintiff to recover and receive the money due on the bond; and that the plaintiff might be at liberty to make use of the names of the defendants in any action to be brought against the obligors, the plaintiff offering to indemnify the defendants against all costs.

Sir Samuel Romilly and *Mr. Roupell*, for the plaintiff.

Mr. Cooke, contra.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] The case of *Snelgrove v. Bailey*, 3 Atk. 214, has established, that there may be a *donatio mortis causa* of a bond, though not of a simple contract debt, nor by the delivery of a mere symbol. The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The cases of *Lawson v. Lawson*, 1 P. Wms. 441; *Miller v. Miller*, 3 P. Wms. 358; and *Jones v. Selby*, Prec. Ch. 300, furnish this rule. Let it be declared that the plaintiff is entitled to this bond as a *donatio mortis causa*; and that, indemnifying the executors, he is at liberty to sue in their names, and let the costs be paid out of the testator's estate.

¹ *Holmes v. Roper*, 141 N. Y. 64 (1894); *Tracy v. Alvord*, 118 Cal. 654 (1897); *Mason v. Gardner*, 186 Mass. 515 (1904), accord.

DUFFIELD v. ELWES.

HOUSE OF LORDS. 1827.

[Reported 1 Bligh, N. S. 497.]

THE EARL OF ELDON.¹ In the first of these causes there is an appeal from the judgment (1 Sim. & Stu. 244) of the then Vice-Chancellor, the present Master of the Rolls, in which he makes this declaration, and from that part of the judgment the present appeal is brought. "This court doth declare, that this court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causa*, the appellant, Emily Frances Duffield, was not entitled to the mortgage moneys secured by the indentures of the 2d and 3d of November, 1820, and the bond of 12th July, 1820, and by the indentures of lease and release and mortgage, dated the 11th and 12th of July, 1820."

This judgment, therefore, proceeds upon the expression of an opinion, that a mortgage security cannot by law be given by way of *donatio mortis causa*; and if it be true that a mortgage security cannot by law be given by way of *donatio mortis causa*, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of the 11th and 12th July, 1820, have been given by way of *donatio mortis causa*; because if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a *donatio mortis causa*.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned judge, from whose judgment this is an appeal, to say, that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a *donatio mortis causa*. I consider it just to state that this is so.

The judgment is commenced by the learned judge in the words I am now about to read. "The case of a bond, I consider to be an exception and not a rule; property may pass without writing either as a *donatio mortis causa*, or by a nuncupative will according to the forms required by the Statute. The distinction between a *donatio mortis causa* and a nuncupative will is, that the first is claimed against the executor, and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the property *inter vivos*:—first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor

¹ The opinion only is given.

is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee, and no court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed" (I shall have occasion to state presently the distinction between the two mortgages), "I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a *donatio mortis causa*, so it would draw after it the mortgage as being a collateral security for the same debt, — but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance."

The principle which is applied in the decision of this case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death, — that the title is not complete till he is actually dead, and that the question therefore never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causa* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty — the executor, and in respect of realty — the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causa*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest. — and I distinguish now between a security upon land and the land itself, — whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact, whether those mortgages and the bond were or were not given in such a manner as constituted a good

donatio mortis causa, if there be no objection to the fact, that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good *donatio mortis causa*, if a mortgage can be the subject of a *donatio mortis causa*. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which would constitute a good *donatio mortis causa*, if in point of law the subject of it can be made the subject of a *donatio mortis causa*, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to make a good *donatio mortis causa* of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between £2,000 and £3,000, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of which are such as I am about to state. There being property considerably more than £30,000 vested in trustees under a marriage settlement, they have advanced £30,000 to Sir Edwin Bayntun Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift *causa mortis* afterwards advanced to the mortgagee that sum of £30,000, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the £30,000; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance—the subject of the assignment to Mr. Elwes.

It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield; but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter; and, accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence, can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favor, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject, which could leave no doubt in the mind of anybody what that intention was.

It occurred afterwards that a declaration of this purpose should be made, and the question is, whether the form of that declaration was sufficient to constitute a gift of the property? There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the instruments,—the mortgages, the bonds, and so on; and it being suggested that it was necessary, in order to make a good *donatio mortis causa*, that there should be delivery of the instruments, subject to the question, whether such delivery constituted a good *donatio mortis causa*; it appears by the evidence of the gentleman who had all these instruments in his hand, that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give, although that manifestation was accompanied with this circumstance—that he was so near the termination of his life, and so reduced, that he could hardly utter the words, but that it was more by a look than a word that he expressed his approbation of what was done. This was therefore a case where one cannot help feeling a very strong wish that it should take effect; but, it must be remembered, we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is, whether the act is complete to this extent—that the donor gave this in such a manner as to constitute a good *donatio mortis causa* which will bind the interest in the executor as to the personal estate, and bind the interest in the heir-at-law with respect to the mortgage security as to the real estate? Because, I apprehend, that in a case where a *donatio mortis causa* has been carried into effect by a Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that that donee has a right to call on a Court of Equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in this decision. The case of *Gardner v. Parker*, 3 Madd. 184, is a decision by the same judge, and was under these circumstances:—It was a gift of a bond by delivering the same and saying, “There, take that and keep it,” in the last sickness of the donor—the donor dying two days afterwards. This was held to be a *donatio mortis causa*, and it was directed that the donee should be at liberty to use the executors’ names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator’s estate, which is founded on this reason, that the money may be recovered in a proceed-

ing at law, by an action in the name of the executors; but if the executors refuse to permit their names to be used, a Court of Equity will compel them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In another case of *Snellgrove v. Bailey*, 3 Atk. 214, "A bond for £100 was given by one Sparkman to Sarah Bailey, which Sarah Bailey delivered to the defendant, saying, 'In case I die, it is yours, and you will have something.' The plaintiff, as administrator to Sarah Bailey, brought a bill to have the bond delivered up." There was a question whether there had been a *donatio causa mortis*, and the administrator there brought a bill to have the bond delivered up, as being in the hands of the alleged donee. Lord Hardwicke, however, decided, that this was a sufficient *donatio causa mortis* to pass the equitable interest, not the legal interest in the bond, upon the intestate's death. I find that Lord Hardwicke, in the case where there was a gift in the nature of a *donatio mortis causa*, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring *trover* for the deeds; but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a *donatio mortis causa*, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is — not whether this was good as a *donatio causa mortis*, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a *donatio causa mortis*? — A question which is left in a state of great uncertainty — a question noticed in some cases, but still left in a state of great difficulty; and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the bearings of the cases to be found with reference to this subject. Upon looking into the cases, I observe that in the very first case I can find Lord Hardwicke to have decided, he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In the case of *Hassell v. Tynte*, Ambl. Rep. 318, in which a lady claimed to have a sum of £1,000 secured by mortgage, which she said she had become entitled to by a *donatio causa mortis* made by the donor (the testator is a wrong term in such a case) — there were two questions, one was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift? The other — whether it was a proper subject of gift? Lord Hardwicke expressed a doubt whether a mortgage deed could be made the subject of a *donatio causa mortis*, and he finished the case by

saying, "I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one, I will not keep up this controversy between her as claiming this £1,000 and the person entitled to the residue if she dies under twenty-one; the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this £1,000 shall be settled upon her or not."

In the case of *Ward v. Turner*, 2 Ves. Sen. 431, which is a leading case upon this subject, Lord Hardwicke entered into a very long consideration of the case in his judgment. The question there was, whether some receipts for stock having been delivered over, it was a good *donatio causa mortis*? He was of opinion it was not; that the mere certificate of the stock was not a document of the title, and where no document of the title has been delivered there can be no transfer of the property, and he held that that was not a good *donatio causa mortis*.

In *Richards v. Symes*, 2 Atk. 319; 3 Barnard. 90; and 2 Eq. Ca. Abr. 617, Lord Hardwicke is represented as having decided, that if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the Statute of Frauds. Now the whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good *donatio causa mortis*, turns upon this,—that the question arises how far the Statute of Frauds will allow of that. Lord Hardwicke was of opinion, according to this case of *Richards v. Symes*, that if a mortgagee gave to a mortgagor the deeds, the Statute of Frauds would not stand in the way; he held clearly that the mortgagee cannot get back the deeds from the mortgagor; then he said that the documents, the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds, as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and a mortgage—and recollect that although a mortgage vests an estate in land (a fee simple mortgage of course vests a fee simple estate in land), yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower—it is, in truth, nothing more than a pledge, and if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident, and then the question arises—not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpoena of that mort-

gagor to reconvey the estate to him, and to execute the requisites of the Statute of Frauds.

In the case of *Hassell v. Tynte*, Lord Hardwicke makes the observation in giving his judgment: — that the case of *Richards v. Symes* was not a precedent of very considerable value; because, he says, that he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I consider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in Barnardiston's Chancery Cases, and when I mention that reporter, I am sorry to have to add, that I am old enough to remember Lord Mansfield, who practised under Lord Hardwicke, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying, that in that book there are reports of very great authority. The case happens to be reported likewise in another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged; but the case as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason: that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causa*), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning — I mean the library and mind of Lord Redesdale. Upon this occasion, he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion, with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, Lord Hardwicke seems to consider that the interest in the land would have passed: "But in all these cases," he says, "there is a difference, both at law and in equity, between absolute estates in fee or for a term of years, and conditional estates for security of money. In the case of absolute estates, it cannot be admitted that parol proof of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the accident attending upon the other (and principal object), and when the debt is discharged the interest in the land follows of course." A trust of the land then arises by operation of law: when a deed is given a trust also arises by operation of law. "At law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor:" and his Lordship said, that "if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, and the

mortgage with it;" and if the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning the case of *Ward v. Turner*, and pointing out the distinction there is between the delivery of a mere chattel, and the delivery of anything which forms part of the title, Lord Hardwicke says this — and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct — "Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causa*, by force of the act" (2 Ves. 443). To be sure, that reasoning is quite idle, unless Lord Hardwicke meant to say that delivery of the deed, with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio causa mortis*.

The case of *Richards v. Symes* was argued by Lord Mansfield, then Mr. Murray. The case of *Ward v. Turner* was also argued by Lord Mansfield, then Mr. Murray; and he appears to have a strong recollection of it, when he got into the Court of King's Bench, where sometimes equity has been rather more misunderstood than it ought to be, which has perhaps led some men belonging to that court to abuse equity, when they knew nothing about the matter. There is a case in the second volume of Burrows' Reports¹ — a case of very great importance — a case in which a man devised lands; the will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to show that he meant to pass the personal interest in his property, and it was a question, whether there was a good devise of the mortgage or not. The land itself could not be said to be devised; but the Court of King's Bench held that it was a very good bequest of the personal interest: and Lord Mansfield, in summing up all this sort of doctrine, says, "A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose." (That I admit is equity.) "The estate in the land is the same thing as the money due upon it — it will be liable to debts — it will go to executors — it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."

I ought to do it in a spirit of great humility, when I question the

¹ *Martin v. Moulin*, 2 Burr. 969.

doctrine of Lord Mansfield. If he meant by that to say that such acts done with the money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him; but to say that the land is to be considered as passing under such circumstances, is that to which I cannot agree; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven; and then, as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate.

Lord Hardwicke, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which, in later times, and in my own time, has become very familiar in the courts of law), — Lord Hardwicke states, as one ground of his opinion in the case of the bond, that it is a good gift *causa mortis*, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it: for, says Lord Hardwicke, no man ever heard (and I have seen in the manuscript of the same Lord Hardwicke, that he said no man ever will hear) that a person shall bring an action upon a bond without the *profert* of that bond; but we have now got into a practice of sliding from courts of equity into courts of law, the doctrine respecting lost instruments; and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea, that the thing might be as well conducted in a Court of Law as in a Court of Equity, a doctrine which cannot be held by any person who knows what the doctrine of Courts of Equity is as to a lost instrument.

Then, if the delivery of a bond would, as it is admitted (notwithstanding any change in the doctrine about *profert*) — if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given: what are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other, the judgment, which is to be considered on the same ground as a specialty, is delivered — with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?

The opinion which I have formed is, that this is a good *donatio mortis causa*, raising by operation of law a trust; a trust which being raised by operation of law, is not within the Statute of Frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, and with a direction to the Court of Equity to proceed in the cause, on the ground of the principle to be found in such a declaration to be made by your Lordships, which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

Mr. Sugden and Mr. Longley, for the appellants.

Mr. Heald and Mr. M. West, for the respondents, the children of Mr. and Mrs. Duffield.¹

MOORE v. DARTON.

CHANCERY. 1851.

[*Reported 4 De G. & Sm. 517.*]

THIS was an administration suit, which now came on to be heard upon exceptions to the report of the Master; and the question was, whether the delivery of two documents constituted a *donatio mortis causa*. The testatrix had advanced to William Moore, one of the plaintiffs, £600, and had taken from him upon that occasion the two documents in question signed by him, and which were as follows:

Received the 22d of October, 1843, of Miss Darton Five Hundred Pounds, to bear interest at 4 per cent. per annum, but not to be withdrawn at less than six months' notice.

£500.

WILLIAM MOORE.

Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye, One Hundred Pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent. to be paid to Miss Darton.

£100.

WILLIAM MOORE.

(I approve of the above) BETTY DARTON.

The transactions relied upon as constituting the *donatio mortis causa* took place on June the 28th, 1845, between Miss Darton and Ann Dye, who was mentioned in the second memorandum, and who was Miss Darton's lady's maid. It was thus described by the lady's maid in her evidence.

"Late in the afternoon of the same day I did assist the said Betty Darton in leaving her bed, and she did, after having so risen, take from the said drawer the said two produced memorandums or receipts, marked respectively A. and B., and she then again placed them in my

¹ See *Kiff v. Weaver*, 94 N. C. 274 (1886).

hands, at the same time requesting me to take care of them, and be sure and not let her nephew Mr. Thomas Harwood Darton see them, and not to let either of them go out of my possession until after her death; and she then directed me, that, immediately upon her death, I was to give the two receipts or memorandums to the said plaintiff William Moore; and her object or purpose in giving me such directions as aforesaid, as she told me and as I believe, was, that she wished that at her death the said debt or sum of £600 so due to her from the said plaintiff William Moore should be cancelled."

Miss Darton died ten days afterwards.

The Master found, that the £600 was an outstanding debt from the plaintiff William Moore, who now excepted to that finding.

Mr. Swanston and *Mr. Mozon* supported the exceptions.

Mr. Walker and *Mr. Pryor*, contra.

Mr. Marshall for other parties.

THE VICE-CHANCELLOR. [SIR J. L. KNIGHT BRUCE.] The case as to the £100 is, I think, beyond the influence of the question, whether there was a *donatio mortis causa*; for, in my opinion, an effectual trust was declared, *inter vivos*, in favor of the servant maid. The document relating to this sum appears to have been written contemporaneously with the creation of the debt. It is thus: [His Honor read it]. Now, although this was not then signed by Miss Darton, yet it is probable, that, as she so intended the transaction, and as she received the document, she would be deemed to have assented to it, even without signing it. But, in fact, she afterwards signed it. Mr. Moore therefore became a trustee of the amount for Miss Darton during her life, and for Ann Dye after Miss Darton's death.

With respect to the £500, the question is much less simple; and I confess that it appeared to me not free from doubt, whether the Wills Act had not precluded any donations *mortis causa* from taking effect. But it does not seem to have ever been so decided or so argued. If, against the ordinary rules of construction, a Statute, passed for the purposes of the revenue, can be referred to for the purpose of determining a question of law beyond its scope, it appears that a Revenue Act has in a manner recognized the existence of such gifts.

My own opinion is, that, according to the true interpretation of the Wills Act, that Statute does not avoid such donations.

The next question is, whether there was a *donatio mortis causa* of this debt. The debt was due from Mr. Moore himself; and the document, the delivery of which is said to constitute a *donatio mortis causa*, was placed in the hands of Ann Dye, and I think, upon the evidence, was placed in the hands of that person as the agent of Mr. Moore, with an intention, which appears to me sufficient, to constitute its delivery a *donatio mortis causa*. If, therefore, by the law an interest of this description can be made the subject of a *donatio mortis causa*, I am of opinion that there was such a gift of it in the present case.

In deciding this case as I mean to do, I certainly have not the

slightest intention of contravening anything that has been said by Lord Hardwicke, Lord Rosslyn, or Lord Eldon, if I could with propriety do so. My decision I consider to be consistent with every word that has been attributed to these eminent judges.

It is true, that the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty.

Its continuance in existence is not now material, however that might have been considered formerly. The delivery of an instrument creating a specialty debt, without which it would not be a specialty debt, as in the case of a bond, would be sufficient for the purpose of a *donatio mortis causa*; and so Lord Eldon decided as to a mortgage. That, however, I agree does not go the length of deciding that the delivery of the mere evidence of a debt would be sufficient. In this case there was something more. The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term. It was a document contemporaneous, I take it, with the creation of the debt. [His Honor read it.] Now this is the document which was delivered to the agent of the debtor himself. The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without a contract to that effect beyond the advance. That particular contract, I agree, might have been entered into without writing; but, as it was created by writing, proof of the writing, if possible, was essential to recover upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was, in substance, delivered *mortis causa* to the person owing the money. In my opinion it is consistent with what was said by Lord Hardwicke, Lord Rosslyn, and Lord Eldon, with the civil law and our own, to hold, as I do, that this was a sufficient delivery to constitute a *donatio mortis causa*, which, in my judgment, it was intended to be.

VEAL v. VEAL.

CHANCERY. 1859.

[Reported 27 Beav. 303.]

THE testatrix, Frances Veal, died on the 29th of March, 1858. She possessed two promissory notes for £60 and £120, both of which were in the following form:—

Box, March 17th, 1852.

On demand, I promise to pay to Miss Frances Veal *or order* the sum of £60, with lawful interest for the same. For value received.

CATHERINE ROWE.
ELIZABETH NOBLE.
THOMAS NOBLE.

£60.

Shortly previous to her death, being told by her medical attendant that her complaint would terminate fatally, she delivered over the two promissory notes, undorsed, to her niece, Mary Maslen, by way, as was alleged, of a *donatio mortis causa*. Mary Maslen retained them down to the death of the testatrix, and now claimed the amount.

The validity of this gift was contested, on the ground that a promissory note payable to order, and not indorsed, could not be made the subject of a *donatio mortis causa*.

Mr. R. Palmer and *Mr. Southgate*, for Mary Maslen.

Mr. Selwyn and *Mr. Locock Webb*, for the plaintiff.

Mr. Lloyd and *Mr. T. E. Lloyd*, for the defendant.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] The question in this case is, whether a testatrix has made a good *donatio mortis causa* of two promissory notes payable to the testatrix "or order," she not having indorsed them. It is solely a question whether such a donation is really good, and if anything more remains to be done by the donor; the state of the authorities is by no means satisfactory. The earlier authorities point very distinctly in one direction, as *Miller v. Miller*, 3 Peere Williams, 356; *Ward v. Turner*, 2 Ves. Sen. 431. Lord Hardwicke extended the doctrine to a bond, but he said he would go no further. Then comes the case of *Duffield v. Elwes*, 1 Sim. & St. 239; 1 Bligh, N. S. 497, in which Sir John Leach laid it down, that the same principle which applied to voluntary gifts *inter vivos* was applicable to donations *mortis causa*, and that if, in the case of a *donatio mortis causa*, something more remained to be done by the deceased person, which this court would not have compelled him to do in his lifetime, it could not be a good *donatio mortis causa* after his death. Lord Eldon came to an opposite conclusion, but he does not appear to have overruled the former decisions; and in that state of the authorities, it becomes very embarrassing to ascertain what the state of the law now is.

I have gone through the cases and some notes of a case not reported, but which is to be found in Chitty on Bills, namely, *Rankin v. Weguelin*. I thought that case extremely important, because it is stated that the bills were payable to order, and I find that the registrar's book fully bears out the conclusion stated in Chitty. It appears from the papers that the bills were drawn on the East India Company in favor of Colonel Weguelin or order, and were accepted; but it does not appear, from the papers, whether they were indorsed by Colonel Weguelin. Shortly before Colonel Weguelin's death, he gave them to his wife. The Master, in taking the accounts, included them in the outstanding estate of the testator, and the widow took an exception to his report. It was heard on the 7th of June, 1832, and it appears beyond all doubt, that the case was argued. The registrar's note-book states, that Mr. Bickersteth opened the exception, and that Mr. Pemberton and Mr. Rolfe were heard in favor of the report, and that several affidavits were read. The court took time to consider, and on

the 14th of June, judgment was delivered by Sir John Leach, who allowed the exception and made a declaration that there was a good *donatio mortis causa*.

It is, therefore, precisely the point which arises in the present case, and as it is a decision of Sir John Leach, whose decision in *Duffield v. Elwes* was overruled by the House of Lords, and who, therefore, must have considered that the decision of the House of Lords had settled the question, I feel bound by it. I also think it a much more healthy state of the law, that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be clear that he intended to give them. I will, therefore, make a declaration, that the two notes passed to Mary Maslen.¹

AMIS v. WITT.

CHANCERY. 1864.

[Reported 33 Beav. 619.]

THE plaintiff David Amis claimed, as against the defendant Stephen Witt, the administrator of Priscilla Floyd, a policy of assurance of the Kent Mutual Assurance Society for £1,000 on her own life, and a deposit note for £400 of the National Provincial Bank of England, which he alleged the intestate had, on her death bed, delivered to him, the plaintiff, by way of *donatio mortis causa*.

Upon the trial of an action at law the jury gave a verdict for Amis, affirming the donation. The judge reserved the point whether a policy of assurance and a bank deposit note could be the subject of a *donatio mortis causa*, and upon a motion for a new trial the Court of Queen's Bench held they could, and refused to disturb the verdict, 1 Best & Smith, 109.

The cause now came on for hearing.

Mr. Selwyn and *Mr. Beavan*, for the plaintiff, argued that the trial at law had determined that the policy and deposit note might be the subject of a *donatio mortis causa*, and had also settled the fact of the gift.

Mr. Bagshawe argued, that the verdict had only determined the right to the papers, and not to the money secured by them, and that the right to the money on such instruments, which were not transferable, could not pass as a *donatio mortis causa*. *Duffield v. Elwes*, 1 Bl. N. S. 497; *Veal v. Veal*, 27 Beav. 303; *Barton v. Gainer*, 3 Hurl. & N. 307; *Moore v. Darton*, 4 De G. & Sm. 517, were cited.

¹ So an unendorsed cheque of a third person in favor of the donor. *Clement v. Cheesman*, 27 Ch. D. 631 (1884). So an unendorsed bill of exchange in favor of the donor. *In re Mead*, 15 Ch. D. 661 (1880); *Edwards v. Wagner*, 121 Cal. 376 (1898). But *Bradley v. Hunt*, 5 G. & J. 64 (Md. 1832), is *contra* the principal case.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] held that the plaintiff was entitled to the policy and deposit note, and to the money paid in respect of them, as *donationes mortis causa*.¹

HEWITT v. KAYE.

CHANCERY. 1868.

[*Reported L. R. 6 Eq. 198.*]

THIS was a special case.

Elizabeth Harrison in 1860 founded a charity called St. Scholastica's Retreat, and in 1861 she founded a charity called St. John's Hospice. By her will, made in September, 1866, she gave all her residuary pure personalty to the trustees of St. Scholastica's Retreat. On the 15th of October, being on her death-bed and in contemplation of her death, she expressed a desire to alter the deed of settlement of St. John's Hospice, and to vest £600 in the trustees of St. John's Hospice upon the trusts of the deed as amended, and accordingly she instructed her solicitor to prepare a deed altering the settlement, and a codicil giving the £600, but she died before either of these documents could be prepared. In the mean time, believing that she would not have time to execute the deed and codicil, she signed and gave to one of the trustees of St. John's Hospice a cheque on her bankers for £600, but she died before it was possible to present the cheque.

The question in the special case, in which the trustees of St. John's Hospice were the plaintiffs, and the executors and the trustees of St. Scholastica's Retreat were the defendants, was, whether the trustees of St. John's Hospice were entitled to receive the sum of £600, the amount of the cheque, out of the testatrix's assets by way of *donatio mortis causa*, or otherwise.

Mr. Bagshawe, for the plaintiffs.

Mr. Speed, for the defendants.

LORD ROMILLY, M. R. I am of opinion, both upon principle and upon authority, that this is not a valid *donatio mortis causa*. When a man on his death-bed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action*, and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which *Amis v. Witt*, 33 Beav. 619, was decided, where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it

¹ *Hani v. Germania Life Ins. Co.*, 197 Pa. 276 (1900), *accord.*

was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave this cheque at night, and she died in the course of the same night before it could be presented; suppose she had said, "I have got £600 in my desk; bring it to me, and I will give you the money," and had died before it was brought to her, that would have been no gift; and the gift of a cheque is the same thing; it is worth nothing until acted upon, and the authority to act upon it, is withdrawn by the donor's death. All the authorities decide that there must be complete delivery; the only case at all tending the other way is *Lawson v. Lawson*, 1 P. Wms. 441, but that has been explained by Lord Loughborough on the principle that the drawing of the bill was in the nature of an appointment. The question must be answered in the negative.¹

M'GONNELL v. MURRAY.

IRISH CHANCERY. 1869.

[Reported I. R. 3 Eq. 460.]²

THE cause petition was filed for the administration of the personal estate of Margaret Morgan, who died intestate on the 23d of January, 1867, by Kate M'Gonnell, who claimed as a *donatio mortis causa* a sum of £70 5s. 8d., deposited in the Abbey-street Savings' Bank in the name of the deceased. Master Litton, to whom the matter was referred, by an order of the 18th of January, 1868, declared that the gift by the intestate to the petitioner of the savings' bank book constituted a good *donatio mortis causa* of the £70 5s. 8d. and interest standing to her credit in the bank.

[The statement of the evidence is omitted.]

A printed copy of the rules of the savings' bank was produced. The following rules were relied on:—

"XIII. PRODUCTION OF THE DEPOSITORS' BOOKS.—That the offices of the savings' bank shall be open on five days of the savings' bank year, on which the book of each depositor shall be produced at the office of

¹ *In re Beaumont*, L. R. [1902] 1 Ch. 889, *accord*. And so although the cheque is accompanied by a pass-book. *In re Beak's Estate*, L. R. 13 Eq. 429 (1872). Cf. *Rolls v. Pearce*, 5 Ch. D. 730 (1877).

See also *Harris v. Clark*, 3 N. Y. 98 (1849).

² Part only of the case is given.

this savings' bank for the purpose of being inspected, examined and verified with the books of the institution by the auditor or auditors."

"XV. REPAYMENTS. — Depositors by themselves, or by any party producing a power of attorney from them, shall be repaid the whole or any part of the sums they shall have lodged, together with the interest due thereon, on giving one week's notice to the clerk in attendance at the office of the institution. Powers of attorney are issued free on giving notice."

Mr. Walsh, Q. C., *Mr. O'Hagan*, Q. C., and *Mr. Roper*, in support of the appeal.

Mr. Lawless, Q. C., *Mr. Jellett*, Q. C., and *Mr. Daniel*, in support of the Master's order.

THE MASTER OF THE ROLLS, [JOHN EDWARD WALSH, first considered the evidence. This part of the opinion is omitted. He then continued.]

If, therefore, the matter had come before me originally, I should have held that the evidence is not sufficient to establish a gift of this kind. But Master Litton having held otherwise, though I do not think that the principle laid down in the case of *Gillespie v. Croker*, 15 Ir. Ch. R. 182, would apply to this case, still I cannot but hesitate before coming to a different conclusion as to the question of fact, so as to act against his opinion. However, having heard the question of law ably discussed, I have come to a conclusion unfavorable to the gift on it also.

To constitute a valid *donatio mortis causa*, there must be an actual delivery of the subject of the gift, and a delivery of a thing by way of symbol, according to the opinion of Lord Hardwicke in *Ward v. Turner*, 1 W. & T. 831, is not sufficient. In *Snellgrove v. Baily*, 3 Atk. 214, Lord Hardwicke held that a bond could be the subject of such a gift. In *Duffield v. Elwes*, 1 Dow & Cl. 10; 1 Bli. N. S. 536, the House of Lords held that the same doctrine applied to mortgages, following an opinion previously expressed by Lord Hardwicke in *Richards v. Syme*, Barnard. Ch. Rep. 90. This doctrine must originally, I rather think, have been founded on the peculiar rules applicable to a specialty of which profert was necessary at law, and the gift of which, with power to retain or destroy it, was consequently a gift of that without which the debt could not be enforced, and in analogy to the distinction established respecting *bona notabilia*. The doctrine has been since supported on the ground that the specialty itself creates and gives a peculiar character to the debt. It has also been extended to other contracts not under seal, *ex. gr.* to bills and promissory notes. It was carried very far by Lord Romilly in *Veal v. Veal*, 27 Beav. 303, where he held that an unindorsed promissory note payable to order can be made the subject of such a gift. The contrary appears to have been held by Lord Hardwicke in 1735, in *Miller v. Miller*, 3 P. Wms. 358, and in *Tate v. Hilbert*, 2 Ves. 111, in which Lord Rosslyn considered that with instruments of this nature no greater effect could be given to the gift in equity than it has at law. In *Rankin v. Weguelin*, 27 Beav. 309, relied on by Lord Romilly, it does not appear whether the notes were indorsed

or not. But the law has fluctuated much since the earlier decisions. *Moore v. Darton*, 4 D. & Sm. 517, was a case where a creditor gave up to a person on behalf of the debtor a special memorandum of the terms of the loan, partly in the form of a receipt. The decision is put on the ground that the memorandum was something more than mere evidence of the debt; and the Vice-Chancellor, Sir Knight Bruce, seems to lay stress on the circumstance that the gift was to the debtor. It was, in this respect, something like the case of *Drury v. Smith*, 1 P. Wms. 404. The distinctions which the Vice-Chancellor takes in his judgment show, I think, that he would not have held the delivery to a third person of a receipt for money a donation to such person of the debt acknowledged in it.

So long ago as 1710, exchequer tallies were held by the Master of the Rolls in *Jones v. Selby*, Prec. in Ch. 300, to be proper subjects of a *donatio mortis causa*. Lord Cowper, however, reversed his decision, though, on a view of the case, not necessarily inconsistent on this point. In *Ward v. Turner*, 2 Ves. 431, Lord Hardwicke held that receipts for South Sea annuities were not capable of being made the subject of such a gift. That was a very carefully considered decision. South Sea annuities were, like the savings' banks, the subject of State regulations. The receipts were given by the managers to parties on their making payment. Subsequent authorities refer to *Ward v. Turner* as one by which future judges ought to regulate their decisions, and as laying down that rules in favor of such gifts ought not to be extended.

I do not quite go with the inference drawn from Lord Romilly's observation in *Hewitt v. Kaye*, L. R. 6 Eq. 200, where he speaks of an I. O. U. as in the same class as a promissory note. Such a document is not a security for money in the sense in which a bond or a bill or a note is. It is merely evidence of a debt.

But the case most strongly in favor of the petitioner's claim here is *Amis v. Witt*, 33 Beav. 619; 1 B. & Sm. 109, where it was held that a deposit note of a bank could be made the subject of a *donatio mortis causa*. The form of the document does not appear from the report; it may have contained something special. At all events it was one which should have been given up on payment. The judgment in the case at law seems to have gone almost entirely on the policy of insurance, which was a special contract by the insurance company. Both reports, that in the Queen's Bench and in Beavan, are unsatisfactory.

In *Hewitt v. Kaye*, L. R. 6 Eq. 275, it was held by Lord Romilly — the same judge who decided *Veal v. Veal* — that a cheque of the donor could not be made the subject of a *donatio mortis causa*. The ground of the decision is that a cheque is a mere order for payment of money, which may be revoked by death, and not a contract creating liability. In *Boutts v. Ellis*, 4 D. M. & G. 249, and in *Bromley v. Brunton*, L. R. 6 Eq. 275, the amount of the cheque was paid, or ought to have been paid (the cheque being presented, and there being assets in the

bank to meet it), in the donor's lifetime. In *Lawson v. Lawson*, 1 P. Wms. 441, the gift of the goldsmith's note was held good, not as a *donatio mortis causa*, but as an appointment of the money. The decision went on the peculiar form of the instrument, which was to the donor's wife to buy mourning.

Assuming these cases to have been all well decided, none of them warrant the proposition contended for before me. To extend the doctrine to a bank-book would be going very much further. I do not find in the Acts¹ relating to savings' banks anything to distinguish a savings' bank pass-book from an ordinary banker's pass-book; and were I to decide that the book in this case is a proper subject of a *donatio mortis causa*, I do not see how I could stop short of holding not only that a bank-book but that any pass-book might be made the subject of such a gift. The book of this savings' bank is rather more unfavorable to the claimant's case than a common bank-book would be; for by the rules printed in it, it appears that payment will be made only to the depositor himself, or on his power of attorney during his life; and after his death smaller sums are payable, as specified by the rules; but if the deposit exceeds £50, it can only be paid on production of probate or letters of administration; the book is required to be produced, and checked with the bank ledger, and the bank is protected against personation if it be lost. But the book does not embody the terms of the contract between the depositor and the bank; the only entries to be found in it are figures or sums of money written in full, in a column for that purpose, to prevent fraud. Consistently with the theory that an actual and not a merely symbolical delivery is required, handing over a written contract must be a delivery of the thing given; and the right to assistance in enforcing the money due on it follows. A contract embodied in a writing is in a sense capable of being given; only one person can have it. But it would be going beyond any case yet decided, to hold that what is merely evidence of, or a voucher for, the debt—of which there may be several—is capable of being thus dealt with.

I am therefore of opinion—both on the question of fact, and the question of law—that the petitioner has failed to establish the gift.²

¹ Stat. 26 & 27 Vict. c. 87 §§ 6, 41, 52, 53 (1863).

² In *In re Weston*, L. R. [1902] 1 Ch. 680, 685, BYRNE, J., said: "In the present case the question arises in reference to a Post Office Savings Bank deposit-book, and, in considering whether or not this is a good subject of a *donatio mortis causa*, the test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is. See *Moore v. Darton*, 4 De G. & Sm. 517, and the judgment of Cotton, L. J., in *In re Dillon*, 44 Ch. D. 82. An examination of the savings bank book in the present case appears to me to shew a fulfilment of the test; and although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the Savings Bank Department. Apart from authority pointing the other way, I should have considered it impossible, after comparing the terms of the deposit receipts in the cases of *In re Dillon*, 44 Ch. D. 76, and

IN RE DILLON.

COURT OF APPEAL. 1890.

[Reported L. R. 44 Ch. D. 76.]

JAMES DILLON, the testator in this action, was holder of a deposit note of the London and Westminster Bank, Lambeth Branch, for £580, the material part of which was as follows:—

“Received from Mr. James Dillon Five hundred and eighty pounds to the credit of his deposit account.

“For the LONDON AND WESTMINSTER BANK,

“A. T., *pro* Manager.”

Moore v. Darton, 4 De G. & Sm. 517, with the savings bank book, to hold that the latter is not a good subject for *donatio mortis causâ*. The case in Ireland of *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460 (which appears to be the only reported case dealing with a savings bank book) was relied upon as an authority to the contrary; and since the argument I have referred also to the case of *Duckworth v. Lee*, [1899] 1 I. R. 405, in the Court of Appeal in Ireland. The latter case dealt with the gift of an I. O. U., and had no reference to a savings bank book, and, consequently, the actual decision in *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, did not come in question; but the general reasoning in *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, including an expression of disagreement with a dictum of Lord Romilly's in *Hewitt v. Kaye* (1868), L. R. 6 Eq. 198, appears to have been treated with approval by some of the judges, and the Lord Chancellor of Ireland expressly states that he sees nothing in the case of *In re Dillon*, 44 Ch. D. 76, to shake the authority of *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460. It is necessary, therefore, to consider carefully what the decision in *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, actually was. It was not necessary to decide the point in the view the Master of the Rolls took of the facts; but it was, in fact, decided that the savings bank book in question in that case was not capable of being given *mortis causâ* so as to confer a right upon the donee to the amount of the deposit. The point there arose, not as to the book of a depositor under the Post Office Savings Bank Act, 1861 (24 & 25 Vict. c. 14), but as to the book of a depositor in a private savings bank governed by the provisions of the General Savings Bank Act of 1863 (26 & 27 Vict. c. 87), Acts which differ considerably in their terms. The only rules of the savings bank apparently relied on in *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, are those set out at p. 463 of the report, and I do not find that it was part of the contract, as it was in the present case, that the book must be produced whenever any money is deposited or withdrawn, nor does it appear that there was any stipulation corresponding with that in the Post Office Savings Bank book to the effect that every deposit must be immediately entered by the postmaster or other person receiving it in the depositor's book, and that the postmaster or other person receiving the deposit must affix his signature and the stamp of his office to each entry. In *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, the Master of the Rolls says that he does not find in the Savings Bank Acts (meaning, according to the reference in the report, the Act 26 & 27 Vict. c. 87) anything to distinguish a savings bank pass-book from an ordinary banker's pass-book; and he also takes the view that the book did not embody the terms of the contract between the depositor and the bank, and, further, that it was merely evidence of, or a voucher for, a debt. It appears to me that the book in *M'Gonnell v. Murray*, Ir. R. 3 Eq. 460, was, in the view taken of it by the Court, of a different nature from that with which I have to deal. I am quite unable to say that the Post Office Savings Bank book is not distinguishable from an ordinary banker's pass-book, and I think it is clearly more than evidence of, or a voucher for, the debt, and I do not see how I can, consistently with the cases of *Moore v. Darton*, 4 De G. & Sm. 517, and *In re Dillon*, 44 Ch. D. 76, do otherwise than hold the book to be capable of being well given so as to create a *donatio mortis causâ*.”

"This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn or the interest paid the depositor must sign the cheque on the back hereof, first affixing a penny stamp. If part only is withdrawn a new receipt will be given for the balance."

On the back of the note was a form of cheque:—

"To the LONDON AND WESTMINSTER BANK, Limited,
 "Lambeth Branch.
 "188 .
 "Pay to self or bearer and interest."

On the 9th of January, 1887, the testator made his will, of which he appointed Francis Duffin, Emma Duffin, and Catherine Duffin executors. He bequeathed to Emma Duffin a house in Walworth, absolutely, and gave her a life annuity of £10.

On Wednesday, the 11th of January, 1888, the testator, who was a widower without children, was taken ill, and Emma Duffin, who was his sister-in-law, went to attend to him.

The evidence given by Emma Duffin was to the effect that the testator took the deposit note out of his chest and said, "I am going to give it to you, conditionally. If I get well, you will give it me back; if not, you are all right." That he then filled up the cheque by inserting the date and amount—£580—adding the word "bearer," after "self or bearer," and signed it upon a 1*d.* stamp, and gave it to her, saying, "Now, you understand, if I get well, you'll give it me back; and if not, it will be all right." No other person was present at this transaction.

On the 15th of January, 1888, the testator died.

Some of the persons interested under the will disputed the gift, and an originating summons was taken out by one of the residuary legatees to have it decided whether there was a good *donatio mortis causâ* to Emma Duffin of the deposit note and the money due upon it. On the 18th of March, 1889, *Stirling, J.*, in Chambers, made an order directing an inquiry whether the deposit note was effectually given to Emma Duffin as a *donatio mortis causâ* or whether the money secured thereby still formed part of the testator's estate; and it was directed that the evidence on the inquiry should be taken by affidavit, but that cross-examination thereon should be in Court before the Judge.

The inquiry was adjourned into Court before *Kekewich, J.*, and Emma Duffin, and some other persons who had made affidavits in her behalf, were orally cross-examined.

Kekewich, J., came to the conclusion that the evidence of Miss Duffin was to be believed, and that there was a good *donatio mortis causâ* of the sum on deposit. The plaintiff appealed.

Cozens-Hardy, Q. C., and *Methold*, for the appellant.
Warmington, Q. C., and *Bramwell Davis*, for Emma Duffin.
COTTON, L. J.

Before dealing with the question of law, I had better consider the evidence. The only witness who can speak to what took place when the deposit note was handed over is Miss Duffin herself. She was orally cross-examined before Mr. Justice *Kekewich*, and, though she appears on one point to have made a mistake as to time, his Lordship was satisfied that her evidence was trustworthy. A slight mistake by a witness as to the time of a particular occurrence is not necessarily inconsistent with the general truthfulness of the evidence; and as Mr. Justice *Kekewich*, who saw and heard her cross-examined, was convinced of the truth of her story, I think we ought not to come to a different conclusion. It was urged that her evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone unless it is corroborated. I do not think that this proposition is now law. Where a claimant's case depends entirely on his own evidence the Judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shewn to be inaccurate in any material point, and which satisfies the Judge of its truthfulness, he ought, I think, to act upon it though it be not corroborated. In the present case, moreover, I think that there are circumstances which tend to corroborate Miss Duffin's evidence. Why did the deceased sign the cheque if he did not intend to give her the money due on the note? I think, therefore, that we must take her evidence as true; and, if so, there was no doubt a good *donatio mortis causâ*, if this document was capable of being the subject of one.

In considering that question I will first deal with the difference between this and the cases cited in argument. I was surprised to find that no evidence was brought forward on either side as to what was the practice of the London and Westminster Bank or of any other banks which put a memorandum of this kind on their deposit notes, or why they put it there. In the absence of such evidence, I come to the conclusion that, in order to preserve convenient evidence when the money is withdrawn, they put the form of cheque on the note, so that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay unless this cheque is signed and produced. If the document was lost they would require some explanation why it was not forthcoming before they paid the money; but I do not think that they could refuse to pay. I cannot think that the requiring this cheque to be signed puts the account on any footing different from that of an ordinary deposit account, so as to prevent the fund from being given away as a *donatio mortis causâ*.

It is said that this is the first time that the question whether a deposit note is a good subject of a *donatio mortis causâ* has come before a Court

of Appeal in England, and we are asked to review the cases. There has, however, been a current of decisions in the Courts of First Instance in England in favour of the donations, and there is a decision of the Court of Appeal in Ireland taking the same view. If we go on principle, why should not this document be a good subject of *donatio mortis causâ*? It is true that the fact of the cheque having been filled in and signed does not give the donee a title at law to be paid, since the cheque was not presented till after the death of the drawer. But why should there not be a good *donatio mortis causâ* apart from the cheque? The case of *Duffield v. Elwes*, 1 Bli. (N. S.) 497, shews that there may be a good *donatio mortis causâ* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. The case of *Moore v. Darton*, 4 De G. & Sm. 517, is very instructive as to the class of instruments which are subjects of *donatio mortis causâ*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, beside acknowledging the receipt of the money, expressed the terms on which it was held, and shewed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causâ* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield v. Elwes*; but the House of Lords there laid it down that the executors were trustees for the donee and must do what was necessary to perfect the transfer. This would not be so in the case of an incomplete voluntary gift *inter vivos* — the Court would not interfere to compel either the donor or his executors to perfect it; the doctrine is an anomalous one peculiar to the case of a *donatio mortis causâ*, but it is established by the decision of the House of Lords. Here probably the assistance of the Court might be dispensed with, as the donee is one of the executors; but I do not rely on that. If the executors had all been strangers, they must, according to *Duffield v. Elwes*, have lent their names to enable her to recover the money, she having an equitable title to it. The proceeding in *Cassidy v. Belfast Banking Company*, 22 L. R. Ir. 68, was irregular, for the executor would have been the proper plaintiff; but the Court went on the principle that the donee had a good equitable title to the money. I am of opinion that the appeal fails. The case of *In re Mead*, 15 Ch. D. 651, was much relied on by the appellant, but is quite distinct from the present case, for there the donor did not intend to give the deposit note, but only to give by means of a cheque a part of the money deposited.

LINDLEY, L. J.

I also agree with Mr. Justice *Kekewich* on both points. We are first asked to hold that he came to a wrong conclusion on the evidence. It would be difficult, I do not say impossible, for us to do so, as the

cross-examination was had *vivâ voce*, and he saw and heard the witness; but so far as I can judge from examination of the notes of the evidence, I agree with his view that Miss Duffin's evidence was truthful.

Then it is contended that a deposit note cannot be the subject of a *donatio mortis causâ*. Why should it not? There is at first sight this difficulty, that it is not a negotiable instrument; consequently a donee of it cannot sue on it in his own name, and the gift being voluntary, the Court according to its ordinary principles will not compel either the donor or his executors to do anything to perfect it. But that difficulty was disposed of long ago in *Duffield v. Elwes*, 1 S. & S. 239; 1 Bli. (N. S.) 497. In that case Sir John Leach decided that the Court would not under circumstances like those of the present case assist the voluntary donee to obtain the benefit of the gift. The House of Lords reversed his decision, disapproved of his reasoning, and held that the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causâ*. That being so, why should not the Court assist the donee in the present case? It is said that here there was no good *donatio mortis causâ*, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case. There is indeed upon the deposit note a form of cheque which has been filled up, stamped, and signed. But what is it that is given — the deposit note or the cheque? Substantially the former; and the authorities are all in favour of the view that a valid *donatio mortis causâ* may be made of a deposit note. We are asked to overrule them. It would be a strong thing to do so after they have been acted on so many years; but, apart from that consideration, I think that on principle we ought to affirm them.

LORES, L. J.

The first point here is whether the *donatio mortis causâ* was proved. I think the Judge was right in believing the evidence of the donee. There was a discrepancy in her statements; but the Judge having seen and heard her, and considered the rest of the evidence, came to the conclusion that her story was to be believed; and I see no reason for thinking that conclusion erroneous. Her evidence was corroborated on almost every point on which under the circumstances any corroboration could be expected.

The second point is whether this deposit note was a good subject of a *donatio mortis causâ*. It seems to be clearly established that the cheque of another person, a promissory note, and an ordinary deposit note are good subjects of such a gift. An objection is taken here on the ground of the form of cheque at the back. In my opinion, that makes no difference. It appears to me to have been merely an arrangement by the bankers to enable them more conveniently to pre

serve evidence of the money having been withdrawn. I think it was clearly the intention of the donor not to give merely a cheque, but to give the deposit note. In my opinion, therefore, the conclusion of Mr. Justice *Kekewich* was quite right.

PENNINGTON v. GITTINGS.

COURT OF APPEALS OF MARYLAND. 1830.

[Reported 2 G. & J. 208.]

BUCHANAN, C. J., delivered the opinion of the court.¹

The bill was filed to compel the defendant, the executor of James Gittings, to transfer to the original complainant, Ann Patterson, daughter of the testator, seventy-five shares of stock, of the Commercial and Farmers' Bank of Baltimore; a certificate of which, it alleges, was given and delivered to her by the testator, who, it is stated, indorsed his name on the back of the certificate in her presence, and at the same time informed her that he gave her the stock.

The answer admits the name of the testator, indorsed upon the certificate to be in his handwriting, but denies that he gave or intended to give the certificate of stock to Ann Patterson, as alleged, and puts the complainant on proof of the allegation; and denies also the delivery of the certificate as stated. . . . Under the view, however, that we had taken of the case, it is not necessary to examine whether the allegations in the bill have been sufficiently established or not, by the proof in the cause. For supposing them to be fully proved, it does not appear to us that the object of the bill can be gratified. The alleged gift seems to have been intended as a *donatio inter vivos*; but whether a *donatio inter vivos*, or *donatio mortis causa*, makes no difference. Such a gift cannot be by mere parol. The rule of law in either case is, that a *delivery* of the *thing* intended to be given, is essential to the perfection of the gift. This is admitted; indeed it cannot be denied. As to donations *inter vivos*, it has never been doubted, that delivery of the thing intended to be given is indispensable; and the same principle is now equally well settled in relation to donations *mortis causa*. The delivery must be according to the manner in which the particular thing is susceptible of being delivered; and that which is not capable of being delivered is not the subject of a donation. There must be a parting by the donor with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentie* (which must be the case, when he retains the possession, and what is done, is merely by parol), there cannot be a perfect and legal dona-

¹ The opinion alone, and part only of that, is given.

tion, and that which is not a good and valid gift in law, cannot be made good in equity.

Proceeding upon this principle, the relief sought in *Mary Tate v. Hilbert*, and *Jane Tate v. Hilbert*, 2d Vesey, Jr. 112, was refused where a man, a short time before his death, gave one a cheque on his banker, which was not presented before his death, and to the other a promissory note, both of them being his relations. They were strong cases, particularly that of the cheque, which, if it had been presented before the death of the deceased, would have been paid, the banker having sufficient funds in his hands.

But the money, the thing that was intended to be given, not having been delivered, they were not good and available donations in law; the promissory note and the cheque being only evidences of contract, they did not transfer the possession of the money, nor invest the persons to whom they were respectively given, with the legal dominion over it, which continued in the deceased until his death, when the property vested in the executors. A promissory note delivered as a donation, is not a vested gift of the money, but only a promise or engagement to give; and imposes no stronger obligations, nor affords a better ground of action, than a promise to deliver any chattel as a gift. Such intended donations cannot be enforced on the consideration of blood, which has been insisted on in this case, and was probably a leading motive with the defendant's testator; in the cases referred to, in 2d Vesey, Jr. 112, *Mary Tate* and *Jane Tate* being stated to have been his relations.

The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that requires a consideration, as a promissory note, cannot be supported on the consideration of blood, or natural love and affection, there must be something more; a valuable consideration, or it is not good and cannot be enforced at law, but may be broken at the will of the party. And being void at law for want of a sufficient consideration, Chancery cannot sustain and enforce it. The cases of *Mary Tate* and *Jane Tate v. Hilbert*, have been mentioned as striking cases, in which the Lord Chancellor manifested a strong desire, more than once expressed, to grant the relief prayed; a desire not foreign from us, so far as sitting here we are permitted to entertain it, but we are, as he then was, restrained by the settled and stubborn rules of law. The case of *Ward v. Turner*, 2d Vesey, Sen. 431, is just this case. It was a bill to compel a transfer of South Sea annuities, the receipt for which had been delivered to the complainant's testator by one Flog, saying, "I give you, Mosely, these papers, which are receipts for South Sea annuities, and will serve you after I am dead." It was argued for the complainant that the delivery of these receipts, with the strong words of gift accompanying it, was as much as could be done towards giving the annuities, except a mere transfer in the books. But it was held that the annuities being the thing intended to be given, a delivery of the annuities was indispensably neces-

sary to make it a good donation; that the delivery of the receipts was not sufficient, and that such a donation could not be made without a transfer, or something equivalent, that being the only mode in which stock or annuities are susceptible of being delivered.

It is supposed that this case differs from that, because, as is alleged, that James Gittings, at the time of delivering the certificate of stock to his daughter, indorsed his name upon the back of it (which does not appear to have been done by Flog, when he delivered the receipts for the annuities) which, it is contended, gave her authority to write over it a full assignment or a power of attorney, which would have enabled her to go to the bank, and cause a transfer of the stock to be made to her on the books. But it is not perceived that this makes any difference, nor is it necessary to inquire whether that indorsement gave any such authority; if it did, it never was executed. It appears upon the face of the certificate itself that the stock was transferable at the bank only, and it is admitted that the indorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate, that was the subject of the intended gift, it matters not whether the indorsement was in full or in blank; for, as in the case of the cheque on the banker, which not being presented and paid in the life-time of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the cheque might, by presenting it in the life-time of the maker, have obtained the money, and thus perfected the gift; so here, even if by the indorsement of the certificate, whether filled up or remaining in blank, Mrs. Patterson might have gone to the bank in the life-time of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery. It was not a valid gift in law, otherwise there would have been no necessity for going into Chancery to perfect it. And being void in law, Chancery cannot interpose to make it good or enforce it. If Mr. Gittings was alive, it could not be seriously contended, that he could be compelled to transfer the stock in the absence of any consideration; and the same principle applies to his executor. His death does not make that good, which was bad before.

Decree affirmed, with costs.

Winchester and Mayer, for the appellant.

Taney (Attorney-General) and *U. S. Heath*, for the appellee.

GRYMES v. HONE.

COURT OF APPEALS OF NEW YORK. 1872.

[Reported 49 N. Y. 17.]

PECKHAM, J.¹ On the 19th August, 1867, the alleged donor being the owner of 120 shares of stock, included in one certificate, in the Bank of Commerce of New York city, made an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, under seal and witnessed, of twenty shares thereof to this plaintiff, his favorite granddaughter, for value received, as the assignment purports, and appointed her his attorney irrevocable to sell and transfer the same to her use. After this paper had been signed, "he kept it by him for a while" (how long, nowhere appears), and afterward handed it to his wife to put with the will and other papers in a tin box she had. When he gave to his wife the paper so drawn, he said: "I intend this for Nelly. If I die, don't give this to the executors; it is n't for them, but for Nelly; give it to her, herself." She asked, "Why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last or what may happen, or whether we may not need it." This is the statement, as given by the widow of donor. It was admitted that, at the time of executing said instrument, the donor was from seventy-eight to eighty years of age, was in failing health, and so continued till his death, January 23d, 1868. Upon these facts was there a valid gift *mortis causa*?

Upon the question as to what constitutes such a gift, the authorities are infinite, not always consistent. But at this time it is generally agreed that, to constitute such a gift, it must be made with a view to the donor's death from present illness or from external and apprehended peril. It is not necessary that the donor should be *in extremis*, but he should die of that ailment. If he recover from the illness or survive the peril, the gift thereby becomes void; and until death it is subject to his personal revocation. 2 Kent, 444, and cases cited; 2 Redfield on Wills, 299 *et seq.*; 1 Story's Eq., § 606, etc., notes and authorities.

In the next place there must be a delivery of it to the donee or to some person for him, and the gift becomes perfected by the death of the donor.

Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery. The appellant insists that the gift in this case fulfils neither requisition.

¹ The opinion only is given.

Was this gift made with a view to the donor's death? It is so found by the referee as a question of fact. What the witness intended to convey by the term "failing health" is not clear; but intendments are against the appellant where the fact is left uncertain. There is nothing in the case inconsistent with the idea that the testator, when he signed this assignment, was confined to his bed, and so continued till his death; though I do not wish to be understood as saying that such confinement was necessary to validate the gift. It seems that he died, as the referee finds, from this failing health, in five months thereafter; so that the terms, as used, indicated a very serious ailment.

True, he did not, and of course could not, know when death would occur when he executed this assignment, but he was in apprehension of it. His age and his "failing" told him death was near, but when it might occur he had no clear conviction. An ailment at such an age is extremely admonitory.

From these facts, can this court say, as matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting "in view" of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do, the gift is avoided. The authorities cited by the appellant's counsel, of *Weston v. Hight*, 5 Shep. Me. 287, and *Staniland v. Willott*, 3 McN. & Gor. Ch. R. 664, are both instances of recovery, and the gifts, on that ground, declared void. In the latter, the donor and his committee recovered back the stocks given, because of his recovery. The first case is improperly quoted in 2 Red. 300, note 11, as not originally authorizing the gift.

The declaration of the donor, that his wife should keep the assignment and not hand it over till after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law, as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void.

The transaction as to such a gift is, the donor says, I am ill, and fear I shall die of this illness; wherefore I wish you to take these things and hand them to my granddaughter after my death; but do not hand them to her now, as I may recover and need them. A good *donatio mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. *Staniland v. Willott*, supra.

To make a valid gift *mortis causa*, it is not necessary that there should be any express qualification in the transfer or the delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. See the last case.

I think this donor made this gift "with a view to his death," within the meaning of the rule on that subject.

2d. This also settles the second requisite, as it is admitted that he did not recover, but died of this "failing health," as it is expressed.

3d. Was there a delivery? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned, this is sufficient. See the elementary writers before cited; also *Drury v. Smith*, 1 P. W. 404; *Sessions v. Moseley*, 4 Cush. 87; *Coutant v. Schuyler*, 1 Paige, 316; *Borneman v. Sidlinger*, 8 Shep. Me. 185; *Wells v. Tucker*, 3 Binn. 366; *Hunter v. Hunter*, 19 Barb. 631. Such a delivery to be given to the grantee after the grantor's death, is good as to a deed of real estate. *Hathaway v. Payne*, 34 N. Y. 92.

It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

Within the modern authorities this gift was valid, notwithstanding these objections. The donor, by this assignment and power, parted with all his interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a *bona fide* purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank (*N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y. 80, and cases cited), though it would give a legal title as against the assignor. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, just decided, and according to the case of *Duffield v. Elwes*, 1 Bligh, N. S. 497, 530, decided in the House of Lords. The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. See also to the same effect *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 De G. M. & G. 176; *Richardson v. Richardson*, 3 Eq. Ca. 686. This trust, like this species of gift, is peculiar. The trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

This extended the law as laid down by Lord Hardwicke, in *Ward v. Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our courts have gone in the same direction with *Duffield v. Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causa*, courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. See last case; *Grover v. Grover*, 24 Pick. 261; *Chase v. Redding*, 13 Gray, 418; *Bates v. Kempton*, 7 Id. 382; and see also *Westerlo v. De Witt*, 36 N. Y. 340; *Walsh v. Sexton*, 55 Barb. 251.

The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A court of equity

will compel the donor's representatives to produce the certificate, that the legal title to the stock may be perfected.

As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time. In this case the proof of the assignment, etc., is entirely clear, the question being as to its effect. The judgment should be affirmed, with costs to be paid out of the estate.

All concur; ALLEN, J., not voting.

Judgment affirmed.

John H. Reynolds, for the appellant.

Orlando Meads, for the respondent.

PIERCE v. BOSTON SAVINGS BANK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[Reported 129 Mass. 425.]

THE first case¹ was an action of contract brought by Martin A. Munroe, in the name of the administrator of the estate of William Green, Jr., to recover deposits in the defendant bank made by Green to the amount of \$600. Writ dated June 19, 1877. The bank defended the action at the request of the administrator. Trial in the Superior Court, without a jury, before *Gardner, J.*, who allowed a bill of exceptions, in substance as follows:—

There was evidence tending to show that the intestate delivered the bank book, issued to him by the defendant, to Munroe, for his own use, as a *donatio mortis causa*, but there was no assignment of the bank book by Green. Upon making the first deposit, Green subscribed to the by-laws of the defendant bank. Printed on the outside of the bank book was the direction, "If you lose this book, give immediate information to the treasurer;" and inside, among the printed by-laws, were the following: "Art. 8. It shall be the duty of the treasurer to enter all deposits and payments made to depositors in the books of the bank, and a duplicate of such entry in the book of the depositor, which shall be his voucher and the evidence of the amount deposited." "Art. 9. No person shall receive any part of his principal or interest without producing the original book."

It appeared that the estate of Green, including said deposits, amounted to \$1,242.87, and that the debts were \$25.40, of which last sum \$25 was for the services of the doctor during Green's last illness, and forty cents for some tobacco, both of which items had been paid,

¹ Two cases were reported together; only the first is here given.

and that the funeral and other expenses did not exceed \$150, unless the alleged donee, Munroe, was to be considered a creditor. Munroe testified that he had a legal claim against Green's estate of \$1,300, for board furnished, and some expenses paid for Green; and on January 20, 1879, he commenced a suit against the administrator to recover said amount, which suit is now pending. Pierce was appointed administrator of Green's estate on January 29, 1877, and the estate was represented insolvent in October, 1879, and commissioners were appointed by the Probate Court.

The defendant requested the judge to rule, as matter of law, as follows: "1. The delivery of the bank book to Munroe by the deceased in his last illness, even if made when he did not expect to recover, and if intended by the deceased as a *donatio mortis causa*, did not pass to Munroe any right to the deposit in the bank. 2. It appearing, from the testimony in the case, that the only property left by the deceased, including the bank deposit, amounted to \$1,242.87, and that the deceased, at the time of the alleged gift, owed Munroe \$1,300 in addition to debts to other persons; that the deceased was insolvent at the time of the alleged gift, and of his death, and the gift of the bank deposit, if good in other respects, as *donatio mortis causa* was void, because in fraud of creditors."

The judge declined so to rule, and found for the plaintiff for the amount of the deposits and the interest accumulated thereon, according to the terms of the deposits, down to the date of the writ, with simple interest at six per cent from the date of the writ, against the objection of the defendant, who contended that by the terms of the deposit the interest from the date of the writ should be, if anything, only at the rate of two per cent semi-annually, being the rate payable according to the terms of the contract of deposit.

To the above refusals to rule, and to the allowance of interest at six per cent from the date of the writ, the defendant alleged exceptions.

C. F. Kittredge, for the defendant.

F. Ames, for the plaintiff.

ENDICOTT, J. It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285; *Kimball v. Leland*, 110 Mass. 325; *Sheedy v. Roach*, 124 Mass. 472; *Davis v. Ney*, 125 Mass. 590.

As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable.

We have not had the question presented to us until now, whether the delivery of the book, without a written assignment or order, is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has, however, been decided in other jurisdictions in the affirmative.

It was held in *Parish v. Stone*, 14 Pick. 198, that the donor's own note, payable to the donee, was not the subject of a *donatio causa mortis*. But it was intimated in the opinion, that a promissory note of another person payable to bearer, or indorsed in blank, so as to pass by delivery, might be a good gift *causa mortis*, and that a mortgage given to secure it would pass as an inseparable incident to the debt, though not assigned, citing *Duffield v. Elwes*, 1 Bligh N. R. 497; and *Duffield v. Hicks*, 1 Dow & Cl. 1. See also *Runyan v. Mersereau*, 11 Johns. 534; *Chase v. Redding*, 13 Gray, 418; *Ford v. Stuart*, 19 Johns. 342.

In *Grover v. Grover*, 24 Pick. 261, the action was by an administrator on a promissory note, which, as appears by the statement of facts, was secured by a mortgage. The note and mortgage were given by the plaintiff's intestate to one Blanchard, in contemplation of death, without assignment. It was held that there may be a valid gift *inter vivos* of a promissory note, payable to the order of the donor, without indorsement or other writing by him. And it was said by Mr. Justice Wilde, in delivering the opinion, after reviewing the earlier English cases, "In coming to this conclusion, we concur with the decision in the case of *Wright v. Wright*, 1 Cowen, 598, wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment." See *Harris v. Clark*, 3 Comst. 93. It was also decided that Blanchard, on the death of the donor, could maintain an action against the maker of the note in the name of the administrator, without his assent. It was not necessary to decide whether the gift of the mortgage security was valid, as the right to maintain the action did not depend upon that question, though *Duffield v. Elwes* was referred to, as deciding that the gift of the debt operated as an equitable assignment of the mortgage.

In *Sessions v. Moseley*, 4 Cush. 87, it was said that "a note of hand of a third person, a security for money, or a chose in action, however it may have formerly been considered, is now held to be the proper subject of such a gift." And in *Bates v. Kempton*, 7 Gray, 382, it was decided, on the authority of these cases, that, by the law of Massachusetts, a negotiable note is the proper subject of such a gift without indorsement, and that the donee may maintain an action on it in the name of the administrator of the donor without his consent. See also *Borneman v. Sidlinger*, 15 Maine, 429. So the delivery of bonds, or a policy of life insurance with the deposit note, have been held to constitute good gifts *mortis causa* without assignment of the instruments. *Snelgrave v. Baily*, 3 Atk. 214, per Lord Hardwicke; *Witt v. Amis*, 1 B. & S. 109; *Wells v. Tucker*, 3 Binn. 366; *Waring v. Edmonds*, 11 Md. 424.

The decision of Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sen. 431, in which he held that the mere delivery of receipts for South Sea annuities was not sufficient to constitute a good gift *causa mortis*, distinguishing it from the case of *Snelgrave v. Baily*, was said by Mr. Justice Wilde, in *Grover v. Grover*, to be technical and unsatisfactory, and to have no application to our laws, which place bonds and other securities on the same footing. In *Westerlo v. De Witt*, 36 N. Y. 340, the delivery of a certificate of deposit on the New York Life Insurance and Trust Company was held to be effectual, without a written assignment, to transfer the deposit itself to the donee as a *donatio causa mortis*. So a delivery to a donee of a savings-bank book containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, has been held to constitute a complete gift of such deposits, and that such delivery vests the equitable title in the donee without assignment. *Hill v. Stevenson*, 63 Maine, 364; *Tillinghast v. Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Penfield v. Thayer*, 2 E. D. Smith, 305.

A savings-bank book has a peculiar character. It is not a mere pass-book,¹ or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay to the depositor the money in its hands except upon presentation of the book; and if in good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor. *Sweeney v. Boston Five Cents Savings Bank*, 116 Mass. 384; *Wall v. Provident Inst. for Savings*, 3 Allen, 96; *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320.

The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same. We can have no doubt that a purchaser, to whom such a book is delivered without assignment, obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale. *Grover v. Grover*, 24 Pick. 261.

In the first of the cases now before us, the delivery of the bank book to Munroe, by Green, in his last sickness, without a written assignment, made in contemplation of death, and with the intent thereby to transfer the deposit in the bank to Munroe, constituted a valid *donatio mortis causa*, and Munroe may maintain an action against the bank for the

¹ In *Ashbrook v. Ryon*, 2 Bush, 228 (Ky. 1867), the delivery of a pass-book was held not to be a good gift *mortis causa*; the bank would seem not to have been a savings bank.

amount of the deposit, in the name of Green's administrator, without his consent.

The judge properly refused to rule, upon the facts presented, that the gift to Munroe made the estate insolvent, and was therefore void because in fraud of creditors.

It is true that a gift *mortis causa* cannot avail against creditors. In such case the donee is in the same position as legatees and heirs, for strictly speaking the only property which a person by gift *causa mortis* or by will can voluntarily dispose of, without consideration, is the balance left after the payment of his debts. Munroe therefore, as donee *causa mortis*, took his title to the bank deposit subject to the right of the administrator to reclaim it, if required for the payment of debts. *Mitchell v. Pease*, 7 Cush. 350; *Chase v. Redding*, 13 Gray, 418. But, upon the facts in this case, Munroe is the only person against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him.

It appears that Pierce was appointed administrator in January 1877, and that the estate of Green, not including the deposits in the bank, amounted to \$642.87. This action was brought in June 1877. In January 1879, Munroe brought an action against the administrator, alleging that Green's estate was indebted to him in the sum of \$1,300, for board of Green and other expenses paid for him. Pierce thereupon represented the estate as insolvent in October 1879, and commissioners were appointed, but no further action seems to have been taken. The only debts besides the claim of Munroe amounted to \$25 for the doctor's bill during Green's last sickness, and forty cents for some tobacco, which have both been paid. The funeral and other expenses did not exceed \$150, but these are not debts within the meaning of the Statute in regard to the settlement of the estates of deceased persons. The expenses of the funeral, and of the last sickness, and the expenses attending the administration, we must presume to have been paid before the estate was declared insolvent. The doctor's bill would come within this category. Gen. Sts. c. 99, § 1. Munroe therefore was the only creditor. If he should establish his claim against the estate for \$1,300, he would be entitled only to what remains of the \$642.87 after the above payments, and could make no claim against the administrator for funds in his own hands, by virtue of the gift from Green. It would be an idle ceremony to have the bank deposit paid over to Pierce, the administrator, in order that he should deduct from it the claim of Munroe, pay him, and also return to him the balance.

As we understand the bill of exceptions, by the terms of the contract upon which the deposit was held by the defendant, the rate of interest thereon is four per cent *per annum*, payable semi-annually. This action is brought upon that contract, and the damages for the non-payment of the money are to be estimated at that rate, till the debt is merged in the judgment. *Brannon v. Hursell*, 112 Mass. 63; *Union Institution for Savings v. Boston*, 129 Mass. 82; *Miller v. Burroughs*,

4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeck*, 4 Cowen, 436. The ruling of the presiding judge, that the plaintiff was entitled to six per cent from the date of the writ, was erroneous. If the plaintiff will remit the two per cent erroneously included in the verdict, the exceptions may be

*Overruled.*¹

BASKET v. HASSELL.

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 107 U. S. 602.]

BILL in equity in the Circuit Court of the United States for the District of Indiana, by Hassell, administrator of the estate of Chaney, against Basket and the Evansville National Bank. The single question was whether a fund represented by a certificate of deposit for \$23,514.70, issued by the bank to Chaney, belonged to Basket, who claimed it as a gift from Chaney, and had possession of the certificate. Basket asserted his title not only by answer, but by a cross-bill. It appeared that Chaney, being in possession of the certificate, during his last illness and in apprehension of death wrote on the back of the certificate this indorsement:—

Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. CHANEY.

The Circuit Court ordered that the certificate of deposit be surrendered to Hassell, and Basket appealed.²

Mr. Philip Phillips and *Mr. W. Hallett Phillips*, for the appellant.
Mr. Asa Iglehart and *Mr. J. E. Iglehart*, contra.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

[After stating the earlier decisions, the learned judge continued as follows:] The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation, according to its

¹ So *Tillinghast v. Wheaton*, 8 R. I. 536 (1867); *Curtis v. Portland Savings Bank*, 77 Me. 161 (1885); *Ridden v. Thrall*, 125 N. Y. 572 (1891). But see *Walsh's Appeal*, 122 Pa. 177 (1888). Cf. *Conser v. Snowden*, 54 Md. 175 (1880).

² This short statement is substituted for that in the report.

terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: *Powell v. Hellicar*, 26 Beav. 261; *Reddel v. Dobree*, 10 Sim. 244; *Farquharson v. Cave*, 2 Colly. C. C. 356; *Hatch v. Atkinson*, 56 Me. 324; *Bunn v. Markham*, 7 Taunt. 224; *Coleman v. Parker*, 114 Mass. 30; *Wing v. Merchant*, 57 Me. 383; *McWillie v. Van Vacter*, 35 Miss. 428; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Michener v. Dale*, 23 Pa. St. 59.

The application of these principles to the circumstances of the present case requires the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It cannot be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was,

in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa*, even where it is payable *in presenti*, unless paid or accepted while the donor is alive; how much less so, when, as in the present case, it is made payable only upon his death.

The case is not distinguishable from *Mitchell v. Smith*, 4 De G., J. & S. 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath — pay the within contents to Simon Smith, or his order, at my death." Lord Justice Turner said: "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

It cannot be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the mean time the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is accordingly.

Affirmed.

COMMONWEALTH v. CROMPTON.

SUPREME COURT OF PENNSYLVANIA. 1890.

[Reported 137 Pa. 188.]

ALEXANDER McNAUGHTON died November 22, 1886, intestate, unmarried, without issue, and, so far as known, leaving no kindred. The State instituted proceedings for escheat. The defendant claimed that McNaughton had made a gift *mortis causa* to her, among other things, of certain shares of stock in railroad corporations. There was testimony tending to show that McNaughton gave to the defendant a box containing, among other things, the certificates of stock. These certificates were not endorsed. The jury returned a verdict in favor of the defendant. The State appealed.

Mr. Samuel Gormley (with him *Mr. John E. Faunce* and *Mr. Frederick K. Gaston*), for the appellant.

Mr. J. Henry McIntyre and *Mr. F. Carroll Brewster*, for the appellee.

Opinion, MR. JUSTICE MCCOLLUM.¹

A gift needs no consideration to support it, yet in the present case there was a valuable one acknowledged by the donor, and impelling him to the action which is the subject of this controversy. For twenty-one years he lived in the family of the donee as a boarder, and had his washing and mending done there, and for these he promised to pay her. He was in poor health the last four years of his life, and required and received from her and her children considerate care and attention. He often manifested grateful appreciation of these services, and expressed a purpose to make compensation for them. In execution of this purpose, he delivered to her the box containing the government bond and the certificates of railroad stock. It is apparent from the evidence that he intended to make an absolute gift of these securities to her, and that he supposed the delivery, and the words accompanying it, invested her with the exclusive control and ownership of them. There remains for consideration the question whether the failure to make a formal written transfer of the securities to the donee, will defeat the purpose of the donor and give them to the commonwealth as an escheat.

It is now settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing. This principle has been applied to notes, bonds, stock and deposit certificates, and life-insurance policies. In *Pennsylvania, Wells v. Tucker*, 3 Binn. 366; *Lacey v. Lacey*, 7 Pa. 251, and *Madeira's App.*, 17 W. N. 202, are illustrations of and rest upon it, and it has distinct recognition and approval in other deliverances of this court. In *Walsh's App.*, 122 Pa. 177, we refused to extend it to a depositor's bank-book, but acknowledged "that, in the case of notes and other instruments payable to order, a delivery accompanied by words importing a present absolute gift would invest the donee with the ownership of the fund." The bank-book was regarded as on the same footing as a book of original entries, and the mere delivery of it to the donee as insufficient to pass any title to the accounts appearing upon it. But "a certificate of deposit is a subsisting chose in action, and represents the fund it describes, as in case of notes, bonds, and other securities, so that delivery of it as a gift constitutes an equitable assignment of the money for which it calls:" *Basket v. Hassel*, 107 U. S. 602. In the case last cited, Mr. Justice MATTHEWS, after an exhaustive examination of the authorities, said: "The point which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting

¹ The statement of facts is condensed and only a part of the opinion is given.

obligation, and be delivered to the donee so as to vest him with an equitable title to the fund it represents and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*."

The shares of stock are choses in action, and the certificates evidence of the title to them: *Slaymaker v. Bank*, 10 Pa. 373. Why may not a delivery of the certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail? A stockholder may clothe another with the complete equitable title to his stock without compliance with the forms printed by the corporation: *United States v. Vaughan*, 3 Binn. 394; *Commonwealth v. Watmough*, 6 Wh. 117; *Building Ass'n v. Sendmeyer*, 50 Pa. 67; *Finney's App.*, 59 Pa. 398; *Water-Pipe Co. v. Kitchenman*, 108 Pa. 630.

As the gift in question was supported by a valuable consideration, and the instruments which represented the ownership of the donor in the subject-matter of the gift were delivered to the donee, we think she has a title to the securities which cannot be destroyed in a proceeding by the commonwealth to escheat them.

Judgment affirmed.

NOTE.—The doctrine of gifts *mortis causa* does not extend to transfers of real estate. *Meach v. Meach*, 24 Vt. 591 (1852); *Wentworth v. Shibles*, 89 Me. 167, 171 (1896).

There can be no gift *mortis causa* where the alleged donee is already in possession of the property. *Drew v. Hagerty*, 81 Me. 231 (1889). *Cain v. Moon*, L. R. [1896] 2 Q. B. 283, *contra*.

In *Debinson v. Emmons*, 158 Mass. 592 (1893), the deceased gave to the donee two trunks and their contents, which were at the foot of the bed on which she lay, at the same time handing to the donee the keys. Held, that a finding was justified that there was a present transfer of the actual possession, dominion and property of the trunks and of their contents. The trunks and their contents were said to be transferred by the delivery of the keys, not because such delivery was a symbolical delivery of the property, but because it was a means of obtaining possession. See also *Stephenson v. King*, 81 Ky. 425 (1888); *Thomas v. Lewis*, 89 Va. 1 (1892). Cf. *Hatch v. Atkinson*, 56 Me. 324, 329 (1868); *Keepers v. Fidelity Title and Deposit Co.*, 56 N. J. Law, 302 (1893).

There can be no gift *mortis causa* by force of a written declaration of the gift made by the donor and delivered to the donee, unaccompanied by delivery of the subject matter of the gift. *McGrath v. Reynolds*, 116 Mass. 566 (1875). But cf. *Kenistons v. Sceva*, 54 N. H. 24 (1873); *Ellis v. Secor*, 31 Mich. 185 (1875).

The donor may make a gift *mortis causa* of all his personal property. *Meach v. Meach*, 24 Vt. 591 (1852). The case of *Headley v. Kirby*, 18 Pa. 326 (1852), is *contra*.

In *McGrath v. Reynolds*, 116 Mass. 566 (1875), the Court found that an intended gift was not of certain "deposits or books specifically, but of a definite larger fund; and the books were delivered merely as means in part to carry out the entire purpose"; and it held that "that purpose failing, there is no intended gift of which the delivery of those books is an appropriate manifestation."

The donee may be charged with the duty to dispose of the property given, or a portion thereof, in a manner specified by the donor. *Hills v. Hills*, 8 M. & W. 401 (1841); *Larrabee v. Hascall*, 88 Me. 511 (1896).

The gift must be made when the donor is under the apprehension of death from some present disease or infirmity. But it is not necessary that the donor should be in *extremis*. *Ridden v. Thrall*, 125 N. Y. 572 (1891). Cf. *Gourley v. Linsenbigler*, 51 Pa. 345 (1865). A gift made in contemplation of suicide is not valid as a gift *mortis causa*. *Agnew v. Belfast Banking Co.*, L. R. [1896] 2 Ir. R. 204.

The gift is revocable until the death of the donor and is revoked if the donor recovers from the disease or infirmity which caused the apprehension of death, or if the donee dies before him. But the delivery must be such as to effect a present transfer subject to such revocation. *Basket v. Hassell*, 107 U. S. 602 (1882), *ubi supra*; *Hart v. Ketchum*, 121 Cal. 426 (1898).

On the revocation of a gift *mortis causa* by the birth of a child to the donor, see *Bloomer v. Bloomer*, 2 Bradf. 339 (N. Y. 1853).

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